TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 123.

KNOXVILLE WATER COMPANY, APPELLANT,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED NOVEMBER 17, 1904.

(19,533.)

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a In the United States Circuit Court for the Northern Division of the Eastern District of Tennessee.

KNOXVILLE WATER COMPANY, Appellant,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE ET AL., Appellees.

Messrs. Shields, Cates and Mouncastle, Knoxville, Tennessee, solicitors for appellant.

J. W. Culton, Esq., R. H. Sansom, Esq., and John W. Green, Esq. (all of Knoxville, Tennessee), solicitors for appellees.

All Proceedings Had before the Honorable C. D. Clark, United States District Judge for the Eastern and Middle Districts of Tennessee.

1 KNOXVILLE WATER COMPANY
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE ET AL.

Prosecution Bond.

United States Circuit Court at Knoxville, Tennessee.

Know all men by these presents that we, Knoxville Water Company, as principal, and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the Mayor and Aldermen of the City of Knoxville, and the Water Works Commission of the City of Knoxville in the penal sum of two hundred and fifty dollars, to be void on condition that said Knoxville Water Company shall prosecute with effect the suit which it has commenced in the United States circuit court at Knoxville, Tennessee, against said Mayor and Aldermen of the City of Knoxville, *et al.*, or pay all the costs and damages incident on failure thereof, or which may be adjudged against us.

This 5th day of August 1904.

KNOXVILLE WATER COMPANY,
By CHARLES T. CATES, JR., Att'y.
[SEAL.]
UNITED STATES FIDELITY & GUARANTY CO.,
By MAYNARD & DAVIES,
Agents & Att'ys in Fact.

Endorsed: No. 1382. Knoxville Water Co. *vs.* Mayor & Aldermen of the City of Knoxville, *et al.* Prosecution bond. Filed August 5th, 1904, J. T. Carter, deputy clerk.

2 Original and Injunction Bill.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

KNOXVILLE WATER COMPANY, Plaintiff,
vs.
MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE, Defendant.

To the honorable the judges of the circuit court of the United States in and for the northern division of the eastern district of Tennessee:

The Knoxville Water Company, a citizen of the State of Tennessee, and a corporation chartered and organized under the laws of the State of Tennessee, brings this, its bill of complaint, against the Mayor and Aldermen of the City of Knoxville, Tennessee, a municipal corporation, chartered under the laws of the State of Tennessee, and located in Knox county, Tennessee, in the northern division of the eastern district of Tennessee, W. L. Russell, F. J. Callen, E. G. Oates, J. Allen Smith and J. Y. Johnston, all citizens and
3 residents of Knoxville, Knox county, Tennessee, and constituting the water works commission of the city of Knoxville in Knox county, Tennessee, and within the northern division of the eastern district of Tennessee.

And thereupon your orator complains and shows:

First.

That it, Knoxville Water Company, is a corporation duly and legally chartered and organized under the laws of the State of Tennessee, section 1, chapter 104 of the Acts of the General Assembly of the State of Tennessee for 1877, and duly certified copies of the charter, along with the amendment thereto, issued to your orator by the State of Tennessee *is* herewith filed as Exhibits Nos. 1 and 2 to this bill, and made a part of the same, but need not be copied in issuing process. The original charter issued to your orator is on file in this court in a case in equity pending in this court styled Knoxville Water Company against Mayor and Aldermen of the City of Knoxville, No 1260, upon the rule docket of this court, and your orator will ask permission, if it shall become material, to withdraw said original charter from that case in order that it may be filed in this case.

Second.

The defendant Mayor and Aldermen of the City of Knoxville is a municipal corporation, chartered under the laws of the State of Tennessee, and is located in Knox county in said city in the northern division of the eastern district of Tennessee.

The defendants, W. L. Russell, F. J. Callen, E. G. Oates, J. Allen

Smith and J. Y. Johnston, are all citizens and residents of said municipal corporation, and claim that they constitute, and do act as, the water works commission of said city of Knoxville,
4 and as such claim the power to exercise certain functions, powers and authority under an act of the General Assembly of Tennessee, known as chapter 153 of the Acts of 1903—The alleged powers and authority of said water works commission and said act will be hereinafter more specifically referred to.

For convenience, the defendant Mayor and Aldermen of the City of Knoxville, will be hereinafter referred to as defendant city, and the other defendants will be referred to as defendant commission.

Third.

Your orator further shows that leave to operate within the defendant city was not only obtained from the corporate authorities of defendant city, and such leave endorsed upon its application for charter and registered with it, but by the terms of its said charter, so granted to your orator as aforesaid, your orator was authorized to construct a system of water works at Knoxville, and its charter among other things contains the following:

"The business of said company shall be to establish and construct water works in or near the city of Knoxville, Tennessee, and it shall be the duty of said company to build, furnish and equip water works of sufficient capacity to furnish the corporate authorities and inhabitants of said city with water.

To enable the company to establish such water works it is hereby authorized and empowered to lay down pipes through the streets, lanes and alleys of said city, in such manner, however, as to produce the least possible inconvenience to the city or its inhabitants, or to travellers, and take up pavements and sidewalks, provided, they shall repair the same with the least possible delay.
5 The company shall have powers, and are hereby authorized to bring into said city a sufficient supply of water by means of pipes or tanks, or in any other way, and to construct reservoirs for the reception thereof, and to supply with water the inhabitants of said city and the environs thereof, and all who may be along the lines of the company pipes, and of erecting hydrants or fire plugs within said city, and to contract with said inhabitants and with the corporate authorities of said city or any incorporated companies for the use of said water, and charge such price for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable rules and regulations respecting the use and waste of said water as the directors of the company may from time to time prescribe."

Fourth.

Your orator further shows that in the year 1882, the defendant city had some ten or eleven thousand inhabitants, but was wholly

without a public water supply, either for municipal purposes or the uses and necessities of its inhabitants, save only such as was afforded by the streams in and about the city and the wells and cisterns, which had been provided by individual inhabitants for their own use. That among other powers conferred upon defendant city by the laws of the State of Tennessee, was the power and authority to provide the city and its inhabitants with a supply of water for fire protection, public, sanitary and domestic purposes, and in pursuance of this power and to carry out the duty owed by it to its inhabitants, the defendant city had some time prior to 1882, and as your orator is informed about 1879 or 1880, determined to build its
6 own water plant for the purpose of supplying itself and its inhabitants with water, and to that end had acquired a considerable amount of real estate lying principally in the 1st and 5th wards of the city of Knoxville—the property in the first ward being located upon the Tennessee river and was intended to be used as pumping station, and the property in the 5th ward being upon a high hill was intended to be used as a reservoir—but it became apparent to the corporate authorities of the defendant city that the building, erection and maintenance of a plant sufficient to supply the needs of defendant city and its inhabitants with water would involve a much larger sum than said defendant city could safely assume in view of the risks and uncertainties incident to such pioneer venture, and so it was resolved by the proper authorities of defendant city that its interests, needs and necessities and those of its inhabitants, would be best subserved by making a contract with some individual, company or private corporation to build a plant sufficient to supply defendant city and its inhabitants with water, and thereupon in 1882, determined to abandon its plan to build a municipal plant, and through its proper officials, by advertisement published in the newspapers printed in the city of Knoxville, invited bids and proposals for the erection of water works in the city of Knoxville, from any responsible person or company, said person or company to build and own the water works, giving the city the option of purchasing them at a certain period or periods to be agreed upon.

In pursuance of said advertisement two competitive propositions were submitted to defendant city, one by the city water company, a private corporation and the other by your orator. The proposition submitted by your orator was deemed more advantageous
7 to the defendant city and was accepted by it, and thereupon on the first day of July 1882, your orator and the defendant city, under the power and authority vested in each of them, duly and legally entered into a contract and agreement for the construction of water works within the city of Knoxville, a copy of which said contract and agreement is herewith filed as Exhibit No. 3 to this bill, and made a part of the same, but need not be copied in issuing process.

By reference to said Exhibit No. 3 your honors will see that in

order to supply said city and its inhabitants with water for fire protection and public, sanitary and domestic purposes, your orator among other things agreed:

A. To erect and establish upon and on the land acquired by the city for that purpose a system of water works sufficient to supply defendant city and its inhabitants with water to be taken from the Tennessee river at the site purchased by defendant city for that purpose.

B. To purchase from defendant city the property already acquired by it for the purpose of erecting water works, and to pay therefor within thirty days after the execution of said contract, and before commencing the construction of said works, the sum of seven thousand, eight hundred ($7,800) dollars.

C. To erect at the points designated by defendant city in said contract seventy-five (75) fire hydrants, and afterwards as many fire hydrants as defendant city might order.

D. *To furnish, free of charge to defendant city water from such hydrants for flushing its sewers and gutters, and for all purposes of the fire department, the city hall buildings and office, and prisons therein.*

E. To supply private consumers with water not to exceed a maximum rate fixed in the contract.

8 F. *To maintain said water works in such condition as may be sufficient and necessary to enable your orator to comply with its undertakings set out in said contract for a period of thirty years from January 1, 1883, unless defendant city should become the owner of said water works within that period, in the manner stipulated in said contract.*

G. To so amend its charter as to limit its bonded indebtedness to one hundred and fifty thousand ($150,000) dollars.

And in consideration of the agreements and undertakings on the part of your orator, the defendant city among other things agreed:

A. To grant and guarantee to your orator all right to, in and upon any and all streets, squares, lanes and alleys, under the control of the authorities of said city for the purpose of building and constructing its pipes, laying its mains, and making all necessary repairs thereon, and maintaining the same for the purpose of operation.

B. *Not to grant to any other person or corporation, any contract, or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes or alleys, or other public grounds, for the purpose of furnishing the defendant city, or the inhabitants thereof with water for the full period of thirty years from the 1st. day of August 1883, provided the company (your orator) complied with the requirements and obligations imposed and assumed by them under and by virtue of this agreement.*

C. *To pay to your orator fifty dollars ($50.00) per annum for each fire hydrant to be erected under said contract.*

9 Further, under and by said contract it was mutually agreed between your orator and defendant city, that at the expiration

of fifteen years from the first day of August 1883, defendant city should have the right to purchase from your orator the water works, and all the property, rights, franchises and privileges, provided in and growing out of said contract "by negotiation, if thus a price could be agreed upon, or if not then at any time for a consideration to be fixed and determined by appraisers," in the manner stipulated and specifically set out in said contract.

The bond provided for in said contract was duly executed by your orator, who thereupon entered upon its undertaking to construct a plant in accordance with and under said contract, and your orator shows and avers unto your honors that it built said plant in compliance with said contract and agreement of July 1, 1882, and within the period therein required began to furnish water to the city of Knoxville and its inhabitants, and ever since that time has been and still is engaged in furnishing water to defendant city and its inhabitants in compliance with the terms and provisions of said contract, and certain amendments thereto, which will be hereinafter fully set out and shown to your honors.

When said contract of July 1, 1882, was entered into between your orator and defendant city, the municipal limits of defendant city of Knoxville were comprised within its first nine wards as they now exist, and the plant and property of your orator in these wards, in due time, were built specially in pursuance of and in compliance with said contract, Exhibit # 3 hereto all of which is shown unto your honors at this time, because as it will hereinafter appear the water supply was first furnished to what is now the 10th and 11th wards of the city of Knoxville under other contracts, which finally became the property of your orator, as will be hereinafter specifically shown.

Fifth.

Your orator further shows unto your honors that some time after it had built and constructed its water plant in compliance with said contract of July 1, 1882, and had thereunder been supplying water to defendant city and its inhabitants, the defendant city, being instigated by certain parties who had been interested in the city water company, whose proposition or offer of a contract had been rejected by defendant city in favor of that of your orator, refused to pay several thousand dollars of hydrant rentals which had accrued under said contract in favor of your orator, and thereupon on the 15th day of June 1885, in order to collect the amount justly due and owing to it from defendant city, your orator was compelled to file a bill in the chancery court of Knox county against defendant city for the purpose of forcing defendant city to comply with said contract and agreement of July 1, 1882, and pay to your orator the hydrant rentals which had accrued to it under said contract. To this bill the defendant first interposed a plea which was overruled, and thereupon defendant city on the 31 day of August 1885 filed an answer

in and by which it set up every possible defense that could have been made by able and ingenious counsel, among which were a denial of the validity of the contract of July 1, 1882 and that your orator had complied therewith. After a large amount of proof had been taken thereon, the case was heard before the chancery court of Knox county on the 4th day of August 1886, and your orator
11 was given a decree for the entire amount sued for as hydrant rental, to-wit, eight thousand seven — seventy five and 26 / 100 ($8,775.86) dollars, including interest. From this decree there was an appeal to the supreme court of Tennessee, wherein on the 7th day of Sept. 1887, in compliance with and conformity to the practice of that court, counsel for defendant city filed assignments of error in which they insisted on substantially all the grounds of objection to the contract that had been set out in the answer of the defendant city, hereinbefore referred to. But after a full hearing upon the transcript of the record from the chancery court of Knox county in said cause, entitled, Knoxville Water Company against Mayor & Aldermen of the City of Knoxville, it was ordered, adjudged and decreed by the supreme court of Tennessee, that there was no error in the decree of the chancery court of Knox county, hereinbefore referred to, that the same was in all things correct, and therefore said decree was accordingly in all things affirmed.

The judgment and decree of the supreme court of Tennessee was entered on October 18, 1887, by a *nunc pro tunc* order appearing upon the minutes of said court under date of October 26, 1887. A petition to rehear was filed in the supreme court, upon which that court rendered a decree on October 26th, 1887, which, after giving the style of the case as above stated, is in the following words:

"Be it remembered that this cause came on to be further heard before the supreme court of Tennessee upon all the proceedings heretofore had in this cause, but more specially upon the petition filed by the defendant to rehear this cause, and the answer thereto. And the court being of the opinion that there is no merit set up in the defense made by defendant to the suit of complainant, and that this is for that reason not a proper case to rehear, the court
12 is pleased to so decree, and to decree that said petition to rehear be and the same is hereby dismissed, and the defendant and its sureties on the appeal bond pay all the costs accrued on said petition to rehear for which execution is awarded."

Therefore your orator avers that the validity of said contract of July 1, 1882, together with a full compliance therewith upon the part of your orator, was adjudged by the supreme court of the State of Tennessee, so that said contract was and is binding upon defendant city and its legality cannot be challenged or attacked.

Sixth.

Further, your orator shows unto your honors that after the aforesaid decree of the chancery court of Knox county in favor of your

orator in the aforesaid cause of Knoxville Water Company against Mayor and Aldermen of the City of Knoxville has been affirmed by the supreme court of the State of Tennessee, as hereinbefore set out, and judgment rendered in favor of your orator against defendant city for the sum of eight thousand seven — seventy five and 86/100 ($8,775.86) dollars, hydrant rental, as hereinbefore shown, and execution had been ordered to issue against defendant city and the sureties upon her appeal bond for said sum and all the costs of said cause, on or about Feb'y 9th, 1888, a proposition was made by the then officials of your orator to defendant city to settle and compromise the differences then existing between your orator and defendant city, and suggesting certain modifications of said contract of July 1, 1882, whereby, among other things the hydrant rental which
13 the city had agreed to pay your orator in said contract was reduced from fifty dollars ($50.00) per annum, to the sum of forty-five ($54.00) dollars per annum for all hydrants over one hundred, and after consideration thereof, said proposition upon the part of your orator was accepted and adopted by defendant city, thus modifying said contract of July 1, 1882, Exhibit No. 3 hereto, in certain particulars set out in said proposition and the resolution adopting and accepting the same, a certified copy of which from the minutes of defendant city, is herewith filed as Exhibit No. 4, to this bill and is made a part of the same, but need not be copied in issuing process.

Seventh.

Your orator further shows unto your honors that on the 18th. day of April 1891, the town of North Knoxville, then a municipal corporation contiguous to defendant city, entered into a contract with a co-partnership styled Wheeler & Parks, their successors and assigns, for the purpose of securing a supply of water to said town and its inhabitants until June 3, 1913, a duly certified copy of which contract is herewith filed as Exhibit No. 5, to this bill, and is made a part of the same, but need not be copied in issuing process. This contract between the town of North Knoxville and Wheeler & Parks was, on November 17, 1893, duly assigned by said Wheeler & Parks to your orator, who in all respects complied with its terms and provisions, but the number of hydrants in that territory are still less than fifty, although your orator has been ready and willing, and still is, to erect additional hydrants on the order of defendant city.

Eighth.

Your orator further shows unto your honors that in 1891, the Lonsdale-Beaumont Water Company was chartered under the laws of the State of Tennessee, chapter 115 of the Acts of the General Assembly of the State of Tennessee for 1885, for the purpose of
14 supplying to the town of West Knoxville, which was then another separate municipality contiguous to the defendant

city of Knoxville; a duly certified copy of the charter of said Lonsdale-Beaumont Water Company is herewith filed as Exhibit 6 to this bill, and is made a part of the same but need not be copied in issuing process.

On the 17th day of September 1892, said town of West Knoxville and said Lonsdale-Beaumont Water Company duly and legally entered into a contract, under and by which said Lonsdale-Beaumont Water Company agreed to erect and build, and did erect and build a system of water works to supply said town and its inhabitants with water: a certified copy of said contract is herewith filed as Exhibit No. 7 to this bill, and made a part of the same, but need not be copied in issuing process. Your orator here calls to the attention of your honors the provisions of said contract of September 17, 1892, as set out in section 13 thereof, whereby it was agreed and provided that after the expiration of seven years from the date of said contract, said town of West Knoxville, or its successors, shall have the right to purchase the plant and property of said Lonsdale-Beaumont Water Company at such price as said parties might agree upon, but if no agreement in respect to the price could be made, then at such price as might be fixed upon an appraisal of said plant and property in the manner stipulated and specifically set out in the 13th section of said contract.

Ninth.

The powers and authorities vested by the laws of the State of Tennessee in the aforesaid towns of West and North Knoxville in regard to water supply, are set forth in their charters in identically the same language as follows:

"To provide the town with water works, or contract with others for water within or beyond the town limits, for town and corporate purposes."

By chapter 323 of the Acts of the General Assembly of the State of Tennessee for 1897, the city of Knoxville, and said towns of West and North Knoxville, were consolidated—the town of West Knoxville becoming the 10th ward and the town of North Knoxville, becoming the 11th ward of defendant city—and by section 8 of said act of consolidation it was provided and enacted "that all valid and lawful contracts of the towns of West Knoxville and of North Knoxville, shall be carried out and performed by the board of mayor and aldermen of the city of Knoxville," and your orator avers that the aforesaid contracts of April 18, 1891, and September 17, 1892, Exhibits Nos. 5 and 7 hereto, were valid and lawful contracts of said towns of West Knoxville and North Knoxville, and by said act of concolidation became obligations of defendant City of Knoxville.

Tenth.

Your orator further shows unto your honors that in the year 1899, the defendant city had grown in population until there were within its limits more than thirty three thousand (33,000) inhabitants, and there had developed necessities for the extension of water mains into certain districts of the city which theretofore had been but very sparsely populated; that at this time the Lonsdale-Beaumont Water Company found itself in such a financial condition that for business reasons, and in order to enable it to comply with its contract with the former town of West Knoxville, as hereinbefore set out, it became desirable that consolidation of said Lonsdale-Beaumont Water
16 Company with your orator be effected, and thereupon said companies, in compliance with the laws of the State of Tennessee, made application to defendant city for permission to consolidate and in order that the consolidated company might be enabled to make all p-oper and necessary extensions of its mains and plant to meet the growing demand for water, that the bond limitation contained in the aforesaid contract of July 1, 1882, Exhibit #3 hereto be removed, but before defendant city would give its consent and approval to said consolidation, said defendant city annexed thereto certain conditions amending the contracts then existing between said consolidating companies and the defendant city, and particularly amending in its own interest the contract of July 1, 1882, and requiring that the ordi-ance granting its approval and consent to said consolidation and containing said amendments to said contracts, should within thirty days, be accepted in writing by said consolidating companies.

Among the most material conditions annexed to said consent and approval were:

(A.) A reservation of the rates provided in the Lonsdale-Beaumont contract of September 17, 1892, in favor of the inhabitants of the 10th. ward of the city (formerly the town of West Knoxville), and that the water to be supplied to said 10th. ward should be equal in quality to that then being supplied by the Knoxville Water Company, which was filtered and was recognized to be of the very best quality."

This condition was especially insisted upon by the inhabitants of the 10th. ward of the city of Knoxville acting through a committee and an attorney who appeared before the council, and in fact drafted that part of said ordinance.

(B.) That the Knoxville Water Company would continue to furnish to all the inhabitants of the remaining wards of the city of Knoxville, other than the 10th ward filtered water at a
17 maximum rate not exceeding the schedule of rates and charges then in force and operation by your orator, under the aforesaid contract of July 1, 1882.

This was the first provision making it obligatory upon your orator to furnish filtered water to the inhabitants of the city of Knoxville, except the provision contained in the North Knoxville contract, which was limited to that territory.

(C.) The option and right to purchase reserved by defendant city in its contract of July 1, 1882, with your orator, and covering only the property of your orator was extended to all the property which it then owned or might afterwards acquire, or which might be acquired by the consolidated company.

(D.) That in order that the consolidations provided for may be effected and to enable your orator and the Lonsdale-Beaumont Water Company to fund their existing debts and obligations, and to provide funds to improve the consolidated plant and make extensions thereto, and in consideration of the benefit to be derived therefrom by the city of Knoxville, and its inhabitants, your orator was released from that provision of its contract with defendant city, dated July 1, 1882, limiting its indebtedness to one hundred and fifty thousand ($150,000) dollars, and that provision was abrogated and annulled;

"Provided, however, that not more than eight hundred thousand ($800,000) dollars of bonds should be issued prior to the first day of January 1901, and provided, further, that no bonds in excess of eight hundred thousand dollars shall be issued except to provide funds for additions to and improvements of the plant and property of your orator, and for any bonds to be so issued your orator was required to file with the recorder of defendant city a sworn certificate showing the actual cost of such additions or improvements, for which bonds may be issued."

18 So may it please your honors the defendant city and your orator on the 20th. day of October, 1899, by an ordinance-contract of that date, legally passed by the defendant and accepted by your orator, entered into an agreement amending the contract then existing between your orator and the defendant, all of which appears from a certified copy of said ordinance-contract of October 20, 1899, and the acceptance thereof by the Lonsdale-Beaumont Water Company and your orator, herewith filed as Exhibit No. 8 hereto and made a part of this bill, but need not be copied in issuing process.

On Jan'y 1, 1900, the consolidation provided for by the ordinance-contract of October 20, 1899, was effected by a conveyance by the Lonsdale-Beaumont Water Company of all its property, contracts, rights, franchises, etc. to your orator, and this conveyance was duly recorded in the office of the secretary of state of the State of Tennessee, as provided by the laws of said State of Tennessee.

Eleventh.

Your orator further shows unto your honors that in the year 1900, the municipal authorities of the city of Knoxville, notwithstanding

your orator was complying in full with all of its contract obligations, began to harrass your orator by passing certain ordinances assuming to regulate the rates and charges of your orator, all of which were in compliance with the terms and provisions of its contracts, and particularly the ordinance-contract of October 20, 1899, and certain litigation was begun by the defendant city before
19 its own recorder to enforce the provisions of said ordinance regulating the rates and charges of your orator, and reducing the same about 22 %, but after the suits instituted by defendant city had been appealed by your orator to the circuit court of Knox county it was discovered that said ordinance, passed on or about July 27. 1900, was invalid for reasons not here necessary to be noticed, and thereupon on March 30, 1901, defendant city again passed an ordinance, in substance the same as the once first passed and ordained, assuming to regulate the charges and rates of your orator. The right of defendant city to pass said ordinance, or to regulate the rates of your orator, was contested, and after litigation between your orator and defendant city, it was determined by the supreme court of the State of Tennessee, whose judgment, upon writ of error to the Supreme Court of the United States was affirmed by that court, that defendant city had the right to regulate the rates and charges of your orator, but that any ordinance so attempting to regulate rates must be reasonable, and in this connection your orator asks leave to refer to the opinion of the supreme court of the State of Tennessee reported in 107 Tenn. 647, and to the Supreme Court of the United States, reported in 189 U. S. 434 where, by both of said courts, the contracts between your orator and defendant city were again recognized as binding upon defendant city by the supreme court of the State of Tennessee, and was recognized by the Supreme Court of the United States, except, however, that under section 2 of chapter 104 of the Acts of 1877, wherein your orator was chartered and organized, defendant city had the right to reasonably regulate the price of water supplied by your orator under its aforesaid contracts. And in this connection your orator deems it proper to say unto your honors
20 that there is pending in this court a suit in equity instituted by your orator against the defendant city challenging said ordinance of March 30, 1901, upon the ground, among other things, that the same is unreasonable and in violation of the 14th amendment to the Constitution of the United States, and such proceedings have been had in said suit in equity, No. 1260 upon the rule docket of this court, that after a large amount of proof has been taken by the master specially appointed in said cause to hear proof and report to your honors, a first draft or tentative report, has been by said special master submitted to counsel, both of your orator and of the defendant city, in order that they may file objections thereto under the rules of this court, and the effect of said report is to hold that said ordinance of March 30, 1901 is invalid because the same is unreasonable and will not yield to your orator a fair return upon the fair

value of its plant now used in furnishing water to defendant city and its inhabitants.

Twelfth.

Your orator further shows unto your honors that after repeated agitation, which was largely injected into several political campaigns, there was developed a strong feeling in favor of municipal ownership and a desire that the city should own and operate for the use of itself and its inhabitants a water plant so that to the end that the plant and property of your orator might be acquired, the General Assembly of the State of Tennessee by an act passed on January 29, 1903, and approved by the governor on Feb'y 2, 1903, known as chapter 12 of the Acts of 1903, and entitled "An act to authorize the city of Knoxville to issue bonds to purchase and acquire the plant and property of the Knoxville Water Company, build extensions thereto and maintain and operate the same," authorized the city of
21 Knoxville to issue bonds "to enable it to acquire the plant and property of the Knoxville Water Company, in accordance with the terms and provisions of the aforesaid contract of July 1, 1882, and the ordinance-contract of October 20, 1899," a true copy of said act is herewith filed as Exhibit No. 9, to this bill and made a part of, the same, but need not be copied in issuing process. And a certified copy of said act or the pamphlet acts published under the authority of the General Assembly will be produced on the hearing of this cause, or sooner if required.

Your orator further shows unto your honors that soon after the passage of said chapter 12 of the Acts of 1903, which was introduced and pressed for passage by the representatives of Knox county in the General Assembly, and gave full power and authority to defendant city to enforce its reserved right to purchase all the plant and property of your orator, it developed by renewed agitation in the city of Knoxville that it was the desire of certain parties to pass another act authorizing the city of Knoxville to build and construct a plant to be run in competition with the plant of your orator, so that such power and authority might be used as a club to compel your orator to sell its plant for less than it was worth, and to deprive it of its contract rights under its aforesaid contract of July 1, 1882, Exhibit No. 3 hereto, and the ordinance-contract of October 20, 1899, No. 8 hereto, and to enable the city to acquire the plant and property of your orator upon its own terms freed from the provisions of said contract of July 1, 1882, in respect of the appraisal of the plant and property of your orator: so that another bill was introduced or offered to the General Assembly authorizing defendant city
22 to issue seven hundred and fifty thousand dollars of bonds to enable it to build and construct a separate and independent plant, coupled with certain provisions authorizing it to negotiate with your orator for the purchase of the plant and property of your orator without reference to your orator's contract rights, and in utter

disregard of the same, and repealing all parts of chapter 12 of the Acts of 1903 in conflict therewith.

This last bill, so offered, as aforesaid, was endorsed by a resolution of the board of mayor & aldermen of defendant city, was pressed before the members of the General Assembly by a committee of citizens, who publicly announced that it was desired to use the "power to build" as a menace to your orator, and was also advocated by the mayor and the chairman of the board of public works of defendant city—both of whom appeared in person before the General Assembly,—so that it was claimed that said General Assembly of the State of Tennessee, passed said bill and enacted the same into a law on March 31, 1903, which was approved by the governor of the State of Tennessee on April 3, 1903, and which legislative act is found among the published acts of the General Assembly for 1903, as chapter 153 of said acts, and a true copy thereof is herewith filed as Exhibit No. 10 to this bill, and for purposes of reference merely, is made a part of the same but need not be copied in issuing process.

Thirteenth.

Your orator further shows unto your honors that defendant city under the authority claimed to be vested in it by said chapter 153 of the Acts of 1903, on or about the 17th day of July, 1903, appointed and elected the defendants W. L. Russell, F. J. Callen, E. G. Oates, J. Allen Smith and one Peter Staub as members of its
23 water works commission, as provided by section 4 of said act, and your orator is informed that said persons so designated and named organized and elected said Staub as chairman of said water works commission, and one Norman B. Morrell, as secretary of said commission. Whether the members of said commission were appointed in strict compliance with said chapter 153 of the Acts of 1903, and whether they were eligible to act upon said commission, and whether they properly qualified as required by said act, your orator is not advised, but deems it sufficient to show unto your honors that said persons so named proceeded to act as a water works commission and were so recognized by defendant city.

Your orator further shows that said defendants, so claiming to act as the water works commission of defendant city, on or about the 6th day of October 1903, sent to your orator a letter which was in the words and figures following, to-wit:

"KNOXVILLE, TENN., September 28, 1903.

Knoxville Water Company, Knoxville, Tennessee.

GENTLEMEN: Under the act creating the Knoxville water works commission, the commissioners are authorized and directed to obtain from the Knoxville Water Company a written proposition for the sale of the plant and franchises, with the view of purchasing the same upon an agreed price and satisfactory terms.

The commission therefore desires to know if the Knoxville Water Company will sell to the city of Knoxville its plant and franchises, and if so, at what price and upon what terms.

KNOXVILLE WATERWORKS COMMISSION,
(Signed) By PETER STAUB, Chairman.
NORMAN B. MORRELL, Secretary."

24 In response to this communication your orator submitted to said commission a proposition to sell its plant and property to the city embodied in a written communication as follows:

"BOSTON, MASS., October 19, 1903.

Knoxville waterworks commission, Knoxville, Tenn.

GENTLEMEN: Your favor under date of Sept. 28th ult. was received by our Knoxville office Oct. 6th., and has been duly noted.

Replying to your inquiry as to whether the "Knoxville Water Company will sell to the city of Knoxville its plants and franchises, and if so, at what price and upon what terms," we beg to advise you that we recognize fully the right of the city to purchase the plant and property of the Knoxville Water Co. under the contract existing between us and the city dated July 1st, 1882, and the several amendments thereto. We beg to assure you that we are entirely willing to comply with every obligation imposed upon us by said contract, and to sell to the city of Knoxville said plant and property at a price to be ascertained in the manner specifically provided and set out in said contract.

Further replying to your inquiry in respect to the "terms," we beg to assure you that while it may be reasonably inferred from said contract that the price to be fixed and arrived at in the manner therein provided shall be paid in cash, yet we do not anticipate any serious disagreement between the city and ourselves with respect to the terms or time of payment when once the fair price contemplated by said contract is determined upon.

We shall be pleased to at once take up the matter with the city authorities, to the end that the provisions of said contract re-
25 specting the sale by the company and the purchase by the city may be effectuated, and hope to receive further communication from you thereon at your convenience.

Yours very truly,

KNOXVILLE WATER CO.
(Signed) ELBERT WHEELER, Treas."

Your orator further shows unto your honors that it had no direct response to its said proposition under date of October 19, 1903, from said water works commission until on or about April 18, 1904, it received another communication from said water works commission, which was in the words and figures following:

"KNOXVILLE, TENN., March 22, 1904.

Knoxville Water Company, Knoxville, Tennessee.

GENTLEMEN: On September —, 1903, we addressed a letter to the Knoxville Water Company, advising the company that under the act creating this commission we were authorized and directed to obtain from the water company, a written proposition for the sale of its plant and franchises, and asking if the company would sell, and if so, at what price and upon what terms.

To this letter you replied that the company was willing to sell according to the terms of a contract made between the water company and the city of Knoxville, July 1st, 1882. We beg to say that we have nothing to do with this contract, as this commission is created under the act of Tennessee legislature, 1903, chapter 153, being "An act to authorize the city of Knoxville to own and operate a system of waterworks, etc."

26 Your mistake in apparently presuming that this commission is acting under the contract of 1882 prompts us to call your attention to this particular act, chapter 153, and to repeat our former inquiry under the same: Will you, the Knoxville Water Company, make a written proposition to the city of Knoxville, through this commission, for the sale of the plant, franchises, etc. as indicated in act to which we have herein referred?

Yours very truly,

KNOXVILLE WATER WORKS COMMISSION.

By PETER STAUB, Chairman.

(Signed) NORMAN B. MORRELL, Secretary."

Thereupon, in order that there might be no sort of misunderstanding in regard to the proposition which your orator had submitted to defendant city through its said water works commission, your orator on or about April 27, 1904, replied to the communication which it had received from said commission on or about April 18, 1904, but which was dated March 22, 1904, and specifically stated the manner in and by which defendant city could acquire and purchase the plant and property of your orator, all of which was embodied in writing as follows:

"BOSTON, MASS., April 27, 1904.

Knoxville water works commission, Hon. Peter Staub, chairman, Knoxville, Tenn.

GENTLEMEN: Replying to your letter of March 22nd. ult. (received as we are advised by our Knoxville office, on April 18th.

27 inst.), renewing your request of September 28, 1903, for proposition for the sale of the plant and property of the Knoxville Water Company to the city of Knoxville, we beg leave to say that if the city concludes to purchase said plant and property, the same may be acquired by it on the following terms, viz:

Each party shall choose two disinterested persons, non-residents of said city, and also of the county of Knox, in the State of Tennessee, and the four thus chosen shall elect a fifth person, likewise disinterested and a non-resident of Knox county, and the said five persons thus chosen shall constitute a board of appraisers, and having accepted their appointment shall each take and subscribe an oath to act fairly, honestly, and impartially in the premises, and having so done, shall proceed to value and appraise the waterworks aforesaid, and all the rights, privileges, easements, and other property appurtenant to said waterworks, belonging to said company, and also to ascertain, determine and declare the amount of indebtedness of said company then in existence, whether by bond or otherwise, constituting a charge upon the property of said company appurtenant thereto aforesaid. And when the purchase price so fixed and determined shall be paid to said company by the city then said company shall and will forthwith, by proper deeds of conveyance, assign, transfer, set over and convey to said city of Knoxville said waterworks and all the rights, franchises, easements, privileges and other property appurtenant thereto, owned by said company at the date of such appraisal and award.

We make the foregoing suggestion of a method to arrive at an amount to be paid for the property, etc., of the Knoxville Water Co., because said company fully recognizes the right of the
28 city to purchase its property, and does not desire to place any obstruction in the way of the city's acquiring said property, but, as you have been advised by our counsel, and of course will well understand, we cannot, and do not at this time name a fixed and specific price, or the terms of payment, for the reason that one of the most material questions involved in the suit now pending between the city and the water company, and now being, considered by Special Commissioner Ewing, is the fair value of said property on a certain date; and we do not desire to do anything that might prejudice the interests of either party to said suit, or which might be construed into an effort to do so. Therefore, we repeat, if the city desires to accept the terms of this proposition, we shall be pleased to meet proper authorities of the city in order to arrange the necessary details as early as practicable.

Very respectfully,

KNOXVILLE WATER COMPANY.

(Signed) ELBERT WHEELER, Treas."

Therefore your orator shows unto your honors and charges that it submitted in writing a proposition for the sale of its plant, franchises etc. to defendant city, under and by which the price and terms of payment could be easily fixed and made certain, and your orator charges that its said proposition so submitted to defendant city through defendant commission was, in law, definite and certain, and was all that defendant city was entitled to, and was not only in full compliance with the method of appraisal provided for in the afore-

said contract of July 1, 1882, but was, in law, a full compliance with "the written proposition for the sale of its plant, franchises, etc.," referred to in section 8 chapter 153 of the Acts of 1903 Exhibit No. 9 hereto.

29 Your orator further shows unto your honors that notwithstanding the written proposition for sale of its property, franchises etc. made by it to defendant city and defendant commission, as hereinbefore set out, the defendant commission on or about the 20th. day of May, 1904, submitted a report to the board of mayor & aldermen of defendant city, which purported to have been signed by defendants Russell, Callen, Oates and Smith (said Staub having died on or about May 18, 1904) wherein, among other things, defendant commission reported that they had been unable to obtain from your orator a written proposition for the sale of its property, franchises, etc., to defendant city, and further reported upon the great benefits to be derived by defendant city from municipal ownership in general and specially from the ownership of a plant which, as stated in said report, was estimated by one Owen Ford to cost $656,483.00, and by one John W. Hill, to cost about $677,730.00, but which report was not accompanied by plans and specifications of said pla-t as required by section 8 of said chapter 153 of the Acts of 1903, and which report was not accompanied by "the opinion of competent disinterested experts as to cost and present value of" the plant, and property and franchises of your orator as required by said section 8 of chapter 153 of the Acts of 1903.

And in this connection your orator further shows unto your honors that defendant commission, either did not procure an opinion from disinterested experts as to the cost and present value of the plant and property of your orator as they were directed to do by section 8 of said chapter 153 of the Acts of 1903, or that if they did procure such an opinion, the same was intentionally and for same ulterior purpose sup-ressed by defendant commission and not submitted by it to the city council of defendant city for its consideration, along

30 with the report and the recommendations which defendant commission made to defendant city. Your orator is informed, and therefore charges the fact to be that if defendant commission did obtain an opinion from the aforesaid Owen Ford in respect of the cost and present value of the plant and property of your orator, it refused upon the demand of a tax payer, who happened to be one of the attorneys for your orator, either to publish said opinion or to submit the same to the "city council" of defendant city, and therefore your orator charges that the sup-ression of said opinion was wrongful and with the intention to deprive said city council and the voters of defendant city of all information in regard to the plant and property of your orator, and to keep from the consideration of the council of defendant city that most material matter which defendant commission was required and directed to obtain and lay before said city council for its consideration.

Your orator further shows unto your honors that notwithstand-

ing its failure to comply with the requirements of section 8 of chapter 153 of the Acts of 1903, in the particulars hereinbefore set out, and its failure to secure such plans and specifications of a new system of warer works as was contemplated in and required by said section 8, yet said defendant commission, through four of its members, as hereinbefore set out, on the 20th. day of May, 1904, reported in writing to the city council, as hereinbefore set out, among other things, in addition to those hereinbefore referred to and stated, that they had "unanimously decided to recommend the building by the city of Knoxville of a system of waterworks, as indicated in Mr. Ford's report, and request that you immediately take the necessary steps to submit the question to our citizens, so that they
31 should decide by their vote to authorize the issuance of the bonds for the specific purpose," that is, the building of a system of water works as indicated by said Ford to be run in competition with the plant and property of your orator.

Your orator further shows unto your honors that the aforesaid report of defendant commission was, in substance, adopted by the corporate authorities of defendant city, and at the same meeting of the board of mayor and aldermen of defendant city, at which said report was presented and adopted, by resolutation of said board of mayor and aldermen an election was ordered to be held on the 2nd. day of July, 1904, "at which shall be submitted to the vote of the qualified voters of the city of Knoxville the question whether or not the city shall issue bonds as provided in the act of the General Assembly aforesaid, to be used for the construction of water works," but on the 3rd. day of June 1904, said action ordering an election for the 2nd. day of July 1904, was rescinded by a resolution duly passed by the board of mayor and aldermen of defendant city, and another resolution passed wherein it was ordered, in lieu of said resolution of May 20, 1904, "that the election on the water works bonds, be held on Saturday July 9, 1904," but without designating the specific purpose for which said bonds were to be issued, and in pursuance of said resolution your orator is informed and so charges the fact to be that the election commissioners of Knox county called an election in the city of Knoxville on the 9th. day of July 1904, for the purpose of voting for or against bonds to be issued for the sole purpose of building and constructing a separate and independent water system for the city of Knoxville, and at said election so held on July 9th, 1904, it was claimed by defendant city and defendant commission that 1818 votes were cast in favor of the issuance of said bonds, and 239 votes against the issuance of said bonds, but your orator shows and charges that said
32 election was not held in compliance with the provisions of said chapter 153 of the Acts of 1903, Exhibit No. 9, hereto, and particularly it was not held in compliance with specific requirements of section 15 of said act, and defendant city wholly failed and refused to have submitted to the legally qualified voters of defendant city the question whether defendant city should purchase the

plant of your orator or construct a new water system, but submitted only one question, and that was whether or not the defendant city should issue bonds for the purpose of building and constructing an independent plant, although as a matter of fact, as your orator is informed and believes, and so charges, a large number of voters were deluded into voting for the bonds upon the statement of those advocating the bonds that they could be issued for the purpose of buying the plant and property of your orator, as well as for building and constructing an independent plant.

Your orator further shows unto your honors that in pursuance of defendant's declared purpose to issue bonds to construct an independent municipal water plant, the city council of the defendant city at its regular meeting on Friday night, July 22nd. 1904, passed upon its first reading an ordinance declaring that at said election on July 9th. 1904, there were cast in favor of the issuance of bonds for the construction of a system of water works, 1818 votes and only 239 votes against said bonds, and that therefore more than ⅔rds. of the votes cast at said election were for the issuance of bonds for said purpose, and further declaring that said bonds were authorized to be issued as a result of said election. And at the same meeting said council or board of aldermen of defendant city passed a resolution binding itself to incorporate into the budget an appropriation
33 of $2,100 to defendant commission, "for the purpose of securing plans and specifications for building a system of water works as provided by chapter 153 of the Acts of 1903." And further at the same meeting said council or board of aldermen upon the nomination of the mayor of defendant city re-elected defendant Smith as a member of said water works commission, and also elected the defendant J. Y. Johnston as a member of said commission to fill out the unexpired term of Peter Staub, deceased.

Fourteenth.

Your orator further shows unto your honors that under and by virtue of its several contracts with defendant city and its charter from the State it has the exclusive right to furnish to defendant city and its inhabitants water for fire protection, public, sanitary and domestic purposes until the first day of August 1903, and relying upon said exclusive right and the guarantees of its charter and of its several contracts with defendant city it has invested in its plant and property, in and about Knoxville, several hundred thousand of dollars, upon which and in pursuance of its agreements with defendant city it has issued its bonds aggregating about $665,000, the proceeds of which, in addition to its stock, have been used in building, maintaining and operating a plant for the purpose of supplying defendant city and its inhabitants with water under and in compliance with its aforesaid contracts; and in addition to said bonds already issued and in the hands of *bona fide* purchasers for value your orator, under its mortgage deed of trust, is fully entitled to

have additional bonds issued for the extensions and additions which it has made to its plant since said $665,000 of bonds were
34 issued to the amount of $125,000; said additional issue to be used for retiring its floating indebtedness and other uses specially set forth in said deed of trust.

And your orator further shows unto your honors that its plant has been built, its bonds sold and its stock issued and sold to a large number of persons, who have purchased the same, upon the faith of your orator's exclusive right to furnish water to defendant city and its inhabitants, as hereinbefore averred, and upon the faith of your orator's contracts with defendant city, and also with the distinct understanding that if defendant city within the period covered by said contract of July 1, 1882, should desire to own and operate a water works plant, that it would acquire the plant and property of your orator under the terms and in the manner provided by said contract of July 1, 1882, recognized and extended by the ordinance-contract of October 20, 1899.

Your orator further shows unto your honors that under its aforesaid contracts with defendant city, *it has set upon* pipes and mains for the use of defendant city 250 hydrants, of which less than 50 are in the 11th. ward of defendant city, formerly the territory covered — the town of North Knoxville, and the aforesaid contract of Wheeler & Parks with said town of North Knoxville, Exhibit No. 5 hereto; and your orator stands ready and willing to erect as many more hydrants upon its pipes and mains as defendant city may desire or order it to erect. But, notwithstanding this fact, defendant city and defendant commission are taking steps to erect some 575 hydrants upon the pipes and mains of a plant devised by Owen Ford, many of which are located within the aforesaid 11th. ward of defendant city, although the number provided for in the contract of Wheeler & Parks with the town of North Knoxville have not yet been erected in said ward, and have never been ordered by defendant city to be so erected, although your orator stands willing
35 and is ready and willing to erect as many hydrants in that territory, or any part of the territory of defendant city as defendant city might need or desire to order.

Your orator further shows unto your honors that it has lived up to and complied with all of its contracts with defendant city and that it has been furnishing defendant city and its inhabitants with an ample supply of water for fire protection, public, sanitary and domestic purposes as contemplated by its said contracts with defendant city and your orator charges that under and by the said contracts, and particularly said contract of July 1, 1882, said ordinance contract of October 20, 1899, and said contracts of the towns of West and North Knoxville with Wheeler & Parks and the Lonsdale-Beaumont Water Company, defendant city exhausted its power to build a separate, independent and competing water plant during the aforesaid periods covered by said contracts, therefore it was and is without power or authority to build a separate, independent and

competing plant to supply itself and its inhabitants with water during the life of the aforesaid contracts, that is before August 1, 1913.

Therefore your orator further charges that said alleged act of the General Assembly of Tennessee known as aforesaid, as chapter 153 of the Acts of 1903, Exhibit No. 10 hereto, is invalid and in contravention, both of the constitution of the State of Tennessee and the Constitution of the United States in that it impairs the obligations of the contracts between your orator and defendant city hereinbefore set out, and especially those provisions of said contracts giving and granting to your orator the exclusive right to furnish defendant and its inhabitants with water until August 1, 1913, and the exclusive right to furnish hydrants to the territory covered by the Wheeler & Parks contracts of April 18, 1891, Exhibit No. 5 hereto, until June 3, 1913.

Your orator further charges and avers that the acts and doings of defendant city in pursuance of the authority assumed to be
36 vested in it by said chapter 153 of the Acts of 1903 is a violation of its contract obligations, as hereinbefore set out, and constitute an impairment of said obligations, within the prohibition both of the constitution of the State of Tennessee, and the Constitution of the United States, which your orator here specially invokes for its protection.

Fifteenth.

Your orator further shows unto your honors that under and by section 3 of said chapter 153 of the Acts of 1903, it is among other things provided in reference to the bonds referred to in said act, that "said bonds and coupons attached thereto shall be exempt from municipal taxation," which provision your orator charges is a separate and independent subject from that expressed in the title of said act and is in no way germane to the subject expressed in the title of said act, and that therefore said act contains more than one subject causing it to be void and in contravention of the constitution of the State of Tennessee which expressly provides that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

But if said act is not void because in contravention of that provision of the constitution of the State of Tennessee above set forth, then your orator further shows and charges that said attempted exemption of said bonds from municipal taxation was unauthorized and beyond the power of the General Assembly of the State of Tennessee, because in contravention of § 28 of article 2 of the constitution of the State of Tennessee, as follows:

"All property, real, personal or mixed, shall be taxed, but the legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation
37 purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational."

Therefore your orator shows that said bonds do not come within any class on account of which the legislature may exempt the same from taxation.

Your orator further shows that by section 18 of article 2 of the constitution of Tennessee, it is, among other things, provided that, "No bill shall become a law until it shall have been read and passed on three different days in each house, and shall have received on its final passage in each house, the assent of a majority of all the members to which that house shall be entitled under this constitution, and *shall have been signed by the respective speakers in open session, the fact of such signing to be noted on the journal," etc.*, and your orator charges that said act of the General Assembly of the State of Tennessee, known as chapter 153 of the Acts of 1903, as aforesaid, was not signed by the speaker of the senate in open session, nor was the fact of such signing noted upon the journals of the senate and is not now so noted, so that your orator charges that said act not having been passed in conformity with the aforesaid mandatory requirements of the constitution of Tennessee, and not having received the signature of the speaker of the senate in open session, which fact was not and is not noted upon the journal of the senate, is therefore void and in contravention of the constitution of Tennessee.

Sixteenth.

Your orator further shows unto your honors and charges that said election held, as aforesaid, on the 9th. day of July, 1904, was void, because:

38 1. Defendant commission either did not secure the opinion of competent disinterested experts as to cost and present value of the plant of your orator, or did not report such opinion to the city council of defendant city for its consideration as required by section 8 of said chapter 153 of the Acts of 1903.

2. That said defendant commission did not secure plans and specifications such as contemplated and required by said section 8 for the construction of a new system of water works and did not report the same to the city council of defendant city for its consideration.

3. That notwithstanding your orator has submitted to defendant commission a written proposition for the sale of its plant and franchises, yet defendant city wholly failed and refused to submit to its qualified voters the question whether said defendant city should purchase the plant of your orator, but submitted alone the question as to whether bonds should be issued to build a separate, independent and competing plant.

4. That said election was not legally ordered or advertised, in that the order of the city council and advertisement by the election commissioners was so insufficient, vague and indefinite as to be void.

Your orator further shows unto your honors that it is one of the largest, if not the largest tax payer in the city of Knoxville, and that its plant and property is valued by the State and municipal

authorities for purposes of taxation at about the sum of $418,000, upon which it pays ad valorem taxes to defendant city of over $5,000, in addition to the privilege tax assessed by defendant city under the laws of Tennessee upon the privilege of doing busi-
39 ness in said city, notwithstanding the leave given by defendant city to operate its plant, within said city under and by its contracts hereinbefore set out.

Your orator further shows that under the statutes of Tennessee no taxes can be levied upon a water plant owned and operated by a municipality, so that if a plant should be built and operated by defendant city in competition with the plant and property of your orator, your orator would be discriminated against in the matter of taxes, and its plant and property subject as it now is to municipal taxes in favor of defendant city, in all probability would be used to aid in the operation of defendant city's water plant.

Seventeenth.

Your orator further shows unto your honors that under chapter 29 of the Acts of 1891 of the General Assembly of Tennessee, defendant city issued $500,000 of five (5%) per cent. bonds, which were used in building bridges, sewers, paving streets, etc., and that under the provisions of said acts of 1891, which is here referred to, the city was required to levy a tax to create a sinking fund sufficient to redeem said bonds, when they would mature about the year 1921, but your orator shows and charges that notwithstanding the heavy taxes which it annually levies and which are wholly insufficient to meet the growing needs of the city and to pay its current expenditures, it has wholly failed to levy the sinking fund tax required by said act of 1891, so that said bonds issued under said act as aforesaid, remain a fixed charge upon the revenue of defendant city, and the property of its tax payers, including that of your orator, without any fund being created as required by said act to pay off and discharge said bonds when they shall mature, therefore your
40 orator charges that defendant city should not be allowed to further issue bonds and incumber its property, and that of your orator, until it shall provide a sinking fund as required by said act of 1891.

Eighteenth.

Your orator further shows unto your honors and charges that it is the declared purpose of defendant city to build a separate and independent water plant as outlined in a general way and recommended by defendant commission in their aforesaid report, and to use the bonds which defendant city claims it is authorized to issue by the result of said election of July 9, 1904, to build such a plant; that your orator is informed and so charges the fact to be, the defendant city and defendant commission is now busily engaged in endeavoring to secure a contract with some person, firm or corpora-

tion to build said plant, and to issue its bonds to pay therefor; and your orator further shows and charges that if the defendant city is permitted to enter into a contract to erect a separate, independent and competing plant, and is permitted to erect such a plant that the result of such action upon the part of defendant city will be the practical confiscation of the plant and property of your orator, will deprive it of its contract rights, hereinbefore set out, and work irreparable injury to it in the loss of the revenue to which it is entitled under said contracts.

Your orator shows unto your honors that it has practically covered the entire ground within the city of Knoxville where there is any demand for a supply of water, and that is is prepared and stands ready and willing to furnish any of the inhabitants within the city of Knoxville, water at reasonable rates whenever there shall be a demand therefor, and that the inevitable result from building
41 a separate and competing plant by defendant city is to deprive your orator of its water consumers now being furnished their water at reasonable rates, and in this way its revenues will be reduced to such a point as your orator fears they will not be sufficient to pay its operating expenses and fixed charges. So that your orator again charges that if defendant city is permitted to consummate the impairment of its contract obligations to your orator, which it has initiated as hereinbefore set out, your orator will suffer irreparable loss and injury, and is remediless therefrom, save in a court of equity.

Your orator further shows unto your honors that if the defendant city is permitted to build a water plant, which is its declared purpose to build, as hereinbefore set out, that thereby the property rights of your orator in the streets of defendant city will be appropriated by said defendant city, and your orator's franchises in said streets under its contracts will be impaired so that your orator's property and franchises will be taken and appropriated by defendant city without just compensation depriving your orator of its property and franchises without due process of law, and also depriving it of the equal protection of the laws:

So that your orator charges that said chapter 153 of the Acts of 1903 of the State of Tennessee and the acts and doings of defendant city thereunder, as hereinbefore set out, including the election of July 9, 1904, are not only unlawful because they impair the obligations of your orator's contracts with defendant city, but they are in contravention of the 14th. amendment to the Constitution of the United States, in that thereby your orator's property and franchises will be taken without due process of law, and your orator will be deprived of the equal protection of the laws.

42 To the end, therefore, that your orator may have that relief to which he is justly entitled in the premises, and which he can only obtain in a court of equity, that the defendants may answer the premises, but not upon oath, the benefit of which is expressly waived, your orator now prays the court:

1. That pending the final litigation upon the subject matter hereof a preliminary injunction or restraining order issue restraining the defendant city, its agents or officials and the defendant Water Works Commission from entering into any contract for the building and construction of a separate, independent and competing plant, and that defendant city, its officials and agents be also enjoined and restrained from issuing the bonds alleged to be authorized by and under the aforesaid act of the legislature of Tennessee, known as chapter 153 of the acts of 1903, Exhibit No. 10, hereto, and by said election held as aforesaid on the 9th. day of July 1904, for the purpose of building and constructing a separate, independent and competing water plant. And that upon the hearing said injunction be made perpetual against both defendants, their officials, agents and attorneys.

2. That the aforesaid act of the General Assembly of Tennessee, being chapter 153 of the Acts of 1903, as aforesaid, be declared void as being in contravention of section 10, of article 1 of the Constitution of the United States, in that it impairs the obligations of your orator's contract rights under the several contracts hereinbefore set out, and especially the terms of July 1, 1882, Exhibit # 3 hereto, the ordinance-contract of October 20, 1899, Exhibit # 8 hereto, and the Lonsdale-Beaumont Water Company contract with the town of West Knoxville, Exhibit # 7 hereto, and the contract of Wheeler & Parks with the town of North Knoxville, Exhibit # 5 hereto.

43 3. That said act of the General Assembly of the State of Tennessee, being chapter 153 of the Acts of 1903, be declared void as being in contravention of the constitution of the State of Tennessee, in that it impairs the obligations of your orator's aforesaid contracts with defendant city, and because it is in contravention of section 17, article 2 of the constitution of the State of Tennessee, providing that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title; and because not signed by the speaker of the senate in open session, and that fact not noted upon the journals of said senate.

4. That the election held on July 9, 1904, as hereinbefore set out, at and by which it is claimed that defendant city is authorized to issue bonds for the purpose of building a separate, independent and competing water plant, be declared void for the reasons hereinbefore stated, and for the further reason that said election was in itself an impairment of the obligations of defendant city under its several contracts with your orator, hereinbefore set out.

5. And if in any way your orator is mistaken in its special prayers it prays for all such other, further and general relief as in equity and good conscience it may be entitled.

6. This is the first application for an injunction or restraining order in this case.

And so may it please your honors to grant unto your orator a writ of subpœna to be directed to said defendants, The Mayor & Aldermen of the City of Knoxville, and the said W. L. Russell,

E. G. Oates, F. J. Callen, J. Allen Smith and J. Y. Johnston,
44 constituting the water works commission of defendant City of Knoxville, requiring them and each of them, at a certain time and under a certain penalty therein to be limited, to appear before your honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, which is waived, and to stand, perform and abide such other order, direction and decree as may be made against defendant in the premises, as should seem meet and agreeable in equity.

And so will your orator ever pray.

KNOXVILLE WATER COMPANY,
[SEAL.] By ELBERT WHEELER, Treasurer.

SHIELDS, CATES & MOUNTCASTLE,
Solicitors for Complainant.

STATE OF MASSACHUSETTS, }
County of Suffolk. }

On this the 25th. day of July, 1904, before me personally appeared, Elbert Wheeler, the general manager and treasurer of The Knoxville Water Company, the complainant in the foregoing bill, and made solemn oath that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, as to those matters he believes it to be true.

ELBERT WHEELER.

Subscribed and sworn to before me on this the 25th. day of July, 1904.

HARWOOD S. PALMER,
[SEAL.] Notary Public.

Endorsed: No. 1382. Knoxville Water Company *vs.* Mayor & Aldermen of the City of Knoxville, *et al.* Orig. & inj. bill. Filed Aug. 5, 1904, at 4:45 p. m. J. T. Carter, deputy clerk.

45 EXHIBITS Nos. 1 & 2.

STATE OF TENNESSEE, }
Department of State. }

I, Jno. W. Morton, secretary of the State of Tennessee, do certify that the annexed is a true copy of the charter of incorporation of the Knoxville Water Company and amendment thereto, the original of which is now of record at my office.

In testimony whereof, I have hereunto subscribed my official signature; and, by order of the governor, affixed the great seal of the

State of Tennessee, at the department in the city of Nashville, this 22nd. day of July, A. D. 1904.

JNO. W. MORTON,
Secretary of State.

[SEAL.]

STATE OF TENNESSEE:

Charter of Incorporation.

Be it known that Peter Straub, John M. Brooks, F. M. Loweree, Joseph T. McTeer, Hector Coffin, Alvin Barton, H. H. Ingersoll, and associates, are hereby constituted a body politic and corporate by the name and style of the Knoxville Water Company.

The general powers of said corporation are as follows:

To sue and be sued by the corporate name; to have and use
46 a common seal which it may alter at pleasure, if no common seal then the signature of the name of the corporation by any duly authorized officer shall be legal and binding; to purchase and hold or receive by gift in addition to the personal property owned by said corporation any real estate necessary for the transaction of the corporate business, and also to purchase or accept any real estate in payment or part payment of any debt due to the corporation, and sell realty for corporation purposes; to establish by-laws and make all rules and regulations not inconsistent with the laws and the constitution deemed expedient for the management of corporate affairs, and to appoint such subordinate officers and agents in addition to president and secretary or treasurer, as the business of the corporation may require; designate the name of the office and fix the compensation of the officers and the term of the same, not however, to exceed two years. To make regulations concerning the subscription for, and the transfer of, stock; fix upon the amount of capital to be invested in the corporate business, the division of the same into shares, the time required for the payment thereof by the subscribers for stock, and the amount to be called for at any one time, on the non-payment of which after notice, a right of action shall accrue to the corporation against the stockholder in default.

The first board of directors shall be the corporators applying for, and obtaining this charter, and thereafter the board shall consist of five or more members, at the option of the corporation, to be elected by a majority of the votes cast by the stockholders, either in person or by proxy, each share representing one vote, a majority of the board of directors shall constitute a quorum, and shall fill all vacancies until the next election.

The board of directors shall keep a full and true record of all
their proceedings, and an annual statement of receipts and
47 disbursements shall be copied on the minutes, which shall be subject at all times to the inspection of any stockholder, and the books of the corporation shall show the original and subsequent stockholders, their respective interests, the amount which has been

paid on shares subscribed, the transfer of stock, by and to whom made, and such other transactions as stockholders or creditors may be presumed to have an interest to know.

The amount of unpaid stock due from a subscriber to the corporation, shall be a fund for the payment of any debts due from the corporation, and the transfer of stock by a subscriber shall not relieve him from liability on his subscription till the full amount has been paid.

The corporation shall have the right and power to borrow money and issue notes on bonds, upon the faith of the corporate property, and also to execute a mortgage or mortgages, as further security for re-payment of money thus borrowed.

The business of said corporation shall be, to establish and construct water-works, in or near the city of Knoxville, Tennessee, and it shall be the duty of said company to build, furnish and equip water-works of sufficient capacity to furnish the corporate authorities and inhabitants of said city with water.

To enable the company to establish such works, it is hereby authorized to lay down pipes through the streets, lanes and alleys of said city, in such manner, however, as to produce the least possible inconvenience to the city or its inhabitants, or to travelers, and to take up pavements and side-walks, provided they shall repair the same with the least possible delay.

The company shall have power, and are hereby authorized, to bring into said city a sufficient supply of water by means of pipes or tanks, or in any other way, and to construct reservoirs
48 for the reception thereof, and to supply with water the inhabitants of said city and the environs thereof, and all who may be along the line of the company's pipes, and of erecting hydrants or fire-plugs within said city, and to contract with said inhabitants, and with the corporate authorities of said city, or any incorporated companies, for the use of said water, and charge such price for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable rules and regulations respecting the use and waste of said water, as the directors of the company may, from time to time, prescribe.

The works and operations of said company shall be so conducted and managed that no annoyance shall accrue therefrom to the health and comfort of the inhabitants of the city, and nothing in this charter shall be so construed as to absolve the company, its officers or agents from any legal proceedings to restrain or abate any nuisance arising from such water-works or operations.

If any person or persons shall injure or destroy any portion of the water-pipes or other property of said company, or shall wilfully open a communication into the street, or into other water-pipes, or let on water after it has been stopped by the company, such person or persons shall be liable for all damages sustained by such proceedings, and also to a penalty not exceeding five hundred dollars, upon conviction before a court having jurisdiction of the offense.

If any person or persons shall take, or use any water of said company for domestic or other purposes without having previously contracted for the same with the officers of said company, such person or persons shall forfeit and pay to the said company the sum of fifty dollars, to be recovered before any justice of the peace in the same manner as other debts are collected by law; provided that nothing herein contained shall be construed to compel the inhabitants of said city to use the water so introduced by said company, or to prevent them from using water obtained in any other way.

And if any person or persons shall wilfully corrupt or permit anything to run into, or fall into, any syream or reservoir, from which the company shall take water to be introduced in said city which shall corrupt the same or render it unpalatable, unwholesome or unfit for domestic or manufacturing use, or for the supply of stationary or locomotive engines, or shall bathe in any dam or reservoir, lead or enter any animal into the same, he shall, on conviction thereof, before any justice of the peace of the civil district in which said water is situated, pay a fine of not less than ten nor more than fifty dollars, one-half to the use of the informer and the other half to the use of said company, and shall moreover remain liable to said company for all damages.

A failure to elect officers at the proper time shall not dissolve the corporation, but those in office shall hold until the election, or appointment and qualification, of their successors.

By no implication or construction shall said corporation be deemed to possess any powers except those hereby expressly given, or necessarily implied from the nature of the business for which the charter is granted, and by no inference whatever shall said corporation possess the power to discount notes or bills, deal in gold or silver coin, issue any evidence of debts as currency, buy any sell any agricultural products, deal in merchandise, or engage in any business outside the purpose of the charter.

The right is reserved to repeal, annul or modify this charter, if it is repealed, or if amendments proposed, being not merely auxiliary but fundamental, are rejected by a vote representing more than half of the stock, the corporation shall continue to exist for the purpose of winding up its affairs, but not to enter upon any new business. If the amendments or modifications, being fundamental, are accepted by the corporation as aforesaid, in a general meeting to be called for that purpose, any minor, married woman or other person under disability, or any stockholder not agreeing to the acceptance of the modification, shall cease to be a stockholder, and the corporation shall be liable to pay said withdrawing stockholders the par value of their stock, if it is worth so much; if not, then so much as may be its real value in the market on the day of the withdrawal of said stockholders as aforesaid: Provided, That the claims of all creditors are to be paid in preference to said withdrawing stockholders.

We, the undersigned, apply to the State of Tennessee, by virtue of the laws of the land, for a charter of incorporation, for the purposes and with the powers declared in the foregoing instrument.

Witness our hands the 27th day of December 1881.

PETER STAUB.
JOHN M. BROOKS.
F. M. LOWREE.
JOSEPH T. McTEER.
HECTOR COFFIN.
ALVIN BARTON.
H. H. INGERSOLL.

51 STATE OF TENNESSEE, }
City of Knoxville. }

I hereby certify that leave to operate under the foregoing charter of incorporation has been duly obtained from the corporate authorities of said city.

Witness my hand, seal of office, this 30th day of December 1881.

GEORGE M. WHITE, Recorder.

STATE OF TENNESSEE, }
Knox County. }

Personally appeared before me J. F. J. Lewis, clerk of the county court of said county, Peter Staub, John M. Brooks, F. M. Lowrie, Joseph T. McTeer, Hector Coffin, Alvin Barton and H. H. Ingersoll, the within named bargainors, with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained.

Witness my hand and official seal at office in Knoxville, Tennessee, this 27th day of December, 1881.

J. F. J. LEWIS, Clerk.

STATE OF TENNESSEE, }
Knox County. }

REGISTER'S OFFICE.

Received for record the 27th day of December A. D. 1881, at 11 o'clock a. m. and recorded in Book "V" vol. 3d, page- 495 to 498, noted in Note Book "B" page 178.

JOHN J. MARTIN, D. Register.

52 I, D. A. Nunn, secretary of state of Tennessee do certify that the charter with certificates attached, the foregoing of which is a true copy, was this day registered and certified to by me, this January 4th. 1882.

D. A. NUNN,
Secretary of State.

STATE OF TENNESSEE:

Amendment to the Charter of Incorporation of the Knoxville Water Company.

Be it known that on the 4th. day of January 1882, a charter of incorporation was granted by the State of Tennessee constituting certain persons therein named, a body politic and corporate by the name and style of *The Knoxville Water Company* with the powers, privileges, conditions and restrictions therein stated (which charter of incorporation was registered in Book "V," vol. 3, pages 495–498 in the register's office for Knox county Tennessee and in Corporation Record Book "G" page 34 in the office of secretary of state of Tennessee), and under and by virtue of said charter the said Knoxville Water Company was afterwards duly organized and a president, secretary and board of directors elected; and at a meeting of the directors and stockholders of the said Knoxville Water Company held July 25th. 1882, at which all officers and stockholders were present, it was unanimously resolved that an amendment be sought to said charter of incorporation of the tenor hereinafter stated.

Now therefore, we the undersigned, comprising the directors and stockholders of the Knoxville Water Company, apply to the State of Tennessee by virtue of the general laws of the land, for an amendment to said charter of incorporation for the purpose of imposing the following restrictions and limitations upon the exercise
53 of the power thereby conferred, to-wit:

XVII. This corporation is prohibited from issuing bonds in excess of the sum of one hundred and twenty-five thousand dollars (par value) for the period of five years next following July 1st. 1882, and after that time in excess of twenty-five thousand dollars additional, and the indebtedness of said corporation by bond, shall not at any time exceed the sum of one hundred and fifty thousand dollars. All bonds issued in violation of this provision as to said corporation, shall be utterly null and void: shall not be obligatory upon said corporation *a* as a debt, nor, in any way constitute a charge upon its property, real or personal, but shall be only the personal and individual liabilities and obligations of the officers and stockholders actually participating in such wrongful issuance of the same; provided, that nothing herein contained be construed or understood as in any way prohibiting or restraining said corporation from altering, enlarging, or adding to its capital stock already subscribed.

Witness our hands the 25th. day of July 1882.

F. M. LOWREE.
ALVIN BARTON.
S. E. COOKE.
PETER STAUB.
SAM McKINNEY.

I, C. C. Nelson, recorder of the city of Knoxville, certify that the board of mayor and aldermen, of the city of Knoxville, have by resolution of said board, approved the foregoing amendment to the charter of incorporation of the Knoxville Water Company, and have granted leave to operate thereunder to said company.

Witness my hand and seal of office, this July 25th. 1882.

C. C. NELSON, Recorder.

54 STATE OF TENNESSEE, }
Knox County. }

Personally appeared before me J. F. J. Lewis, clerk of the county court of Knox county, S. E. Cooke, F. M. Lowree, Peter Staub, Alvin Barton and Sam McKinney, the within named bargainors, with whom I am personally acquainted, and who acknowledged that they executed the foregoing instrument for the purposes therein contained, and it is certified for registration accordingly.

Witness my hand and seal of office at Knoxville, Tennessee, this July 25th. 1882.

J. F. J. LEWIS, Clerk.

STATE OF TENNESSEE, }
Knox County. }

REGISTER'S OFFICE.

Received for record the 25th. day of July, A. D. 1882, at 4½ o'clock p. m., and recorded in Book "W" vol. 3rd., pages 570–571, noted in Note Book "B" page 193.

JOHN J. MARTIN, D. R.

I, D. A. Nunn, secretary of state of Tennessee, do certify that the charter with certificates attached, the foregoing of which is a true copy, was this day registered and certified to by me, this July 27th. 1882.

D. A. NUNN,
Secretary of State.

Endorsed: Copy charter of incorporation of Knoxville Water Co. and am'dm't. Registered in office of secretary of state, 4 day of January 1882, and 27th. July 1882. Received fee, $10.00 for copy. Total, $10.00. Jno. W. Norton, secretary of state.

Endorsed: No. —. Knoxville Water Co. *vs.* Board of Mayor & Aldermen of Knoxville, *et al.* Exhibits Nos. 1 & 2. Filed Aug. 5, 1904, J. T. Carter, deputy clerk.

55 EXHIBIT No. 3.

Articles of Agreement for the Construction of Water Works for the City of Knoxville.

This memoranda of an agreement, made and entered into this 1st. day of July, 1882, by and between the Knoxville Water Company of said city, in the State of Tennessee, party of the first part and the board of mayor and aldermen of the city of Knoxville, Tennessee, party of the second part, witnesseth:

That the said company in order to supply the said city with water for fire protection and public sanitary and domestic purposes does hereby agree:

I.

1st. That it will erect and establish upon and on the land acquired by said city for that purpose a sistem of water works with reservior, and all proper and necessary mains, pipes, hydrants, machiney, buildings and other appurtenances and incidents necessary and sufficient to supply said city with water (to be taken from the Tennessee river at the site purchased by the city for that purpose) for all purposes hereinafter stipulated, the said water works and every part thereof to be of the best standard material and constructed in a proper and good workmanlike manner, not inferior to or of less capacity but in every way as good, ample and substantial and of equal dimensions as contemplated and required by the specifications schedules, drawings, maps and details prepared for the city aforesaid by one Moses Lane; nor shall any of the mains, pipes, hydrants, buildings, machinery, pumps and other appurtenances be of
56 quality inferior to that contemplated by said plans and specifications, schedules, drawings, maps and details, a copy of which is now on file in the office of the city engineer of said city, and is hereby referred to and made part of this agreement.

2nd. The reservoir shall be built on the site indicated in the said Moses Lane map, and shall have a capacity of three millions, two hundred thousand gallons of water, as per specifications of said Moses Lane.

3rd. Said company will erect and establish seventy-five fire hydrants, twenty of which shall have double nozzles, with threads cut to suit the hose connections now in use in the city aforesaid, the same to be located on the line of the main pipes, at the points and along the curb lines of said city, as indicated by a map of the city drawn by the city engineer and prepared for water-works purposes, by Moses Lane, which provides for the placing of sixty-three fire-hydrants, the remaining twelve hydrants to be placed at such other points along said curb lines as may be determined by the city previous to the laying of the pipes, which are to supply the hydrants with water; and said map is also hereby made a part of this agree-

ment for the purposes mentioned. And the said company will erect for the use of said city from time to time, as the city may direct and at such points as the city may designate, as many additional hydrants as the necessity of the city may require, provided, however, that any additional hydrants thus erected shall not be located at a distance exceeding six hundred feet from an existing hydrant or from each other.

4th. And the said company guarantees that the said water works and fixtures throughout shall be of first class material as hereinbefore stated, and capable of supplying two millions gallons of
57 water every twenty-four hours, and shall afford an uninterrupted daily supply to said city, of such quantity thereof as shall be required (not exceeding the amount above specified, except in cases of unavoidable accident or injury to the works of the company, which shall be repaired in the shortest practicable time.

5th. Said company will furnish water free of charge, except the rental of hydrants as herein stipulated) from the hydrants for the sprinkling of the streets and flushing of gutters and sewers along, on and under such streets of said city as are or may be curbed, guttered or sewered. Provided, that in flushing not more than two of said hydrants shall be opened and used therefor at one time; also said company will furnish free, through said hydrants, water for all purposes of the fire department and for supplying the city hall buildings and office and prison therein.

Sprinkling streets.

Purposes of fire dept. city hall bldg. & prisons therein.

6th. Said company hereby agrees to purchase from said city the property already acquired by the city for the purpose of erecting water-works, including lands, plans, specifications, drawings, maps, etc. etc., and to pay therefor within thirty days from the execution of this agreement and before commencing the construction of said works, the sum of seven thousand eight hundred dollars.

7th. Said company will supply private consumers with water at a rate not to exceed five cents per one hundred gallons, provided, however, which is expressly understood that the entire cost of introducing from the mains into
58 private premises including cost of meter when used, shall be borne by the parties introducing or ordering the same, and that no main or distributing pipe shall be tapped by any person, except a plumber licensed for that purpose by said company.

5c. per 100 gals.

Plumber licensed for that purpose by said company.

8th. The work of construction shall be commenced within thirty days from the execution of this agreement and shall be pushed forward to completion with all reasonable expedition so as to be in operation and prepared to supply the city, water, in the quantity

hereinbefore stipulated, within twelve months after the time specified for commencing work, provided, however, that if the company shall at any time during said period of twelve months be delayed from working or restrained therein by injunction or other legal process or order, sued out or obtained by the city, or any of its citizens, or by any ordinance of said city, the time during which the company may be restrained or delayed shall not be included or reckoned in computing said period above fixed for completing said works.

9th. Said company will at its own expense repair, replace and restore all the streets, lanes, alleys, ways and sidewalks in, through or under which it may lay its mains, pipes and other appurtenances, necessary for the erection and maintenance of the works with all convenient and reasonable expedition and as fully and completely as before excavation, provided, that when any part of any street, lane, alley way or side-walk is used for making excavations or such other work is done thereon as is necessary for the erection and maintenance of said water-works, it shall be done in such manner as to give the least inconvenience to the inhabitants of the city.

To restore all streets in as good condition as before excavation.

59

And said company further binds itself to observe all precautions necessary for preventing accidents, whether the same are prescribed by ordinance or not. And the said water company covenants to indemnify and save harmless the said party of the second part against all damages, which may be adjudged against said party of the second part for any injuries to person or property accruing through the negligence or want of due care and precaution of the company in opening, keeping open, lighting or closing excavations or placing or removing obstructions in or upon the streets of the city of Knoxville, provided, that the said party of the second part shall in all cases make diligent and proper defense to any suits that may be brought against the city for injuries accruing as aforesaid, from the negligence of said company, and shall not compromise or submit to arbitration any such suit or a use without the express consent of said company.

Suits, accidents, damages, etc.

10th. Said company will maintain the water-works herein stipulated to be built, in such condition as may be sufficient and necessary to enable it to comply with its undertakings herein set forth, for the period of thirty years from January 1st. 1883, unless the city shall become the owner of the same within that period, as may be done in the manner hereinafter stipulated.

30 yrs. from 1st Jan'y. 1883.

11th. And said company hereby agrees forthwith to take steps to so amend its charter and within one month so to amend the same as to prohibit it from issuing bonds in excess of

To amend charter.

one hundred and twenty-five thousand dollars for the period
60 of five years from the execution of this agreement and after that time from issuing additional bonds in excess of twenty-five thousand dollars; and it is agreed that the indebtedness of the company by bond shall not exceed the amount of one hundred and fifty thousand dollars, only one hundred and twenty-five thousand of which can be issued within the same period of five years.

12th. And the said water company will at its own proper expense construct and establish in connection with the water works, a system of telegraphic fire alarms of such quality and efficiency as that in general use in cities consisting of two alarm boxes in each of the present eight wards of the city, located at such points as the city shall designate with proper telegraphic connections with a central station, which the company will establish at the city hall, the central station having proper telegraphic connections with the pump works of the company, so that the additional quantity of water required may be supplied by the engine—the main leading to the site of the fire and the central station may be properly connected with the engine house of the city.

And the said city in consideration of the premises on its part covenants and agrees:

1st. To grant and guarantee to said company all right to enter upon any and all streets, squares, lanes, alleys under the control of the authorities of said city, for the purpose of laying pipes, mains, etc., and making repairs of said works, to take up pavements and sidewalks on the same and to make such excavations therein as may be convenient or advantageous and necessary for the purposes aforesaid; and the right and privilege to lay pipes, &c., on, across, or through bridges and culverts of the city for conducting and distributing water for public and private uses:

61 Provided, however, that the company shall perform their agreement as set out in section nine, hereinbefore written; and the city does also further grant the right of way through all public grounds and places controlled by it to the contractors, free of cost, so far as the same may be necessary or advantageous for the erection, construction and maintenance of the said water works.

2nd. The city further obligates itself not to grant to any other person or corporation, any contract, or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes, or alleys or other public grounds for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty years from the 1st day of August A. D. 1883, provided the company comply with the requirements and obligations imposed and assumed by them under and by virtue of this agreement.

3rd. The city further covenants and agrees to pay to said company for rent of the seventy-five hydrants hereinbefore stipulated to be erected, fifty dollars each per annum, payable in quarterly installments on the last day of each quarter, beginning on the day

upon which the city shall commence receiving a supply of water from said works, and for any additional hydrants erected for the use of the city it will pay in the same manner at the rate of not more than fifty dollars each per annum.

4th. The city will by ordinance give to such company such protection against injury, whether by negligence or unwarranted or malicious interference or interruption of any kind, as the legislative department of the city may lawfully do under its charter and the laws of the land.

5th. And upon payment by said company of said sum of seven thousand, eight hundred dollars, as provided hereinbefore in
62 section six, said city binds itself to execute to the company a proper deed with covenants of seizure, freedom from encumbrances, further assurance and general warranty, to all property conveyed to the city for water-works purposes by the following persons, to-wit: First by Catharine and Mary Shetterly, by deed dated Sept. 16, 1879, registered in Book "T" vol. 3rd. page 50 register's office of Knox county, Tennessee. Second by W. A. Henderson and Peter Staub, by deed dated Sept. 8th. 1879, registered in same book, page 52. Third, by S. T. Atkin, by deed dated Sept. 8th. 1879, registered in same book page 53. Fourth, by A. S. Prosser and others by deed dated Sept. 15th. 1879, registered in same book page 48; fifth, by H. W. Hall, by deed dated Sept. 8th. 1879, and registered in same book, page 54, and also all rights of way for the use of the water works which may have been secured by the city therefor during the year 1879.

6th. And the said board of mayor and aldermen in view of the benefit and advantage accruing to the city and its citizens from the construction of said works and the erection of said hydrants, covenants and agrees with the said water company to pay in addition to the annual rent of fifty dollars, as hereinbefore provided, and as an additional annual rent for the said seventy-five hydrants, a sum equal to that which, under the laws of the State and the ordinances and resolutions of the city would be annually assessed as taxes for city purposes and uses on property of the same kind, quantity and value as that owned by the said water company within the corporate limits of the city of Knoxville.

Provided, that the said additional annual rental shall only be paid for the term of five years next following 1st. of August, 1894, and no longer.

III.

Expiration 15 yrs. city can buy.

1st. And it is hereby mutually
63 agreed and understood that at the expiration of fifteen years from the time hereinbefore fixed for the completion of said water-works, the city shall have the right, upon giving one year's notice of such purpose and intention, to purchase from said company the water works herein provided for, and all the prop-

erty, rights, franchises and privileges thereto belonging by negoti-tions if thus the terms can be agreed upon, or if not, then at any time for a consideration to be fixed and determined by appraisers; and if not purchased at the end of fifteen years, the said works, property and franchises, rights, privileges, etc., may upon the same terms and conditions, and in the same way be purchased by the city at the expiration of each and every year thereafter. But in no case shall such right or purchase exist or be exercised unless due notice thereof be given by the city to the company one year before the expiration of the period aforesaid or either of them. And in the event of such notice and the failure of the parties hereto to agree upon the terms and conditions of sale, the price to be paid and other matters necessary to close the same, then in that event each party shall choose two disinterested persons non-residents of said city and also of the county of Knox in the State of Tennessee, and the four thus chosen shall select a fifth person likewise disinterested and a non-resident of Knox county, and said five persons thus chosen shall constitute a board af appraisers and having accepted their appointment, shall each take and subscribe an oath to act fairly, honestly and impartially in the premises, and having so done, shall proceed to value and appraise the waterworks aforesaid, and all the rights, privileges, franchises, easements and other property appurtenant to said waterworks belonging to said company, and also to ascertain, determine and declare the amount of indebtedness of said company, or of which its successors or assigns would become liable, and in view of such indebtedness shall decide, determine and award the net value of said water works and all other property of said company appurtenant thereto aforesaid. And such award of said board of appraisers or that of a majority thereof — be final and conclusive upon the parties. And when the purchase price so fixed and determined shall be paid to said company by the city, then said company shall and will forthwith by proper deeds of conveyance, assign, transfer set over and convey to said city of Knoxville, said water works, and all the rights, franchises, easements, privileges and other property appurtenant thereto owned by said company at the date of such appraisal and award.

Each to choose 2 parties.

64

2nd. And it is further understood and agreed by and between the said parties that the said Knoxville Water Company shall not transfer, set over or assign the contract hereinbefore made for the construction of water works to any company, corporation or individual whatsoever; provided, that nothing herein contained shall be construed as prohibiting or restraining the said Knoxville Water Company from mortgaging or conveying in trust the lands, easements, estate, rights, privileges and franchises herein granted and agreed and contracted to be granted for the purpose of securing the bonded indebtedness of said company (subject as to the amount to the provisions hereinbefore stated) as prohibiting or restraining said water

company from subletting or agreeing with sub-contractors for the construction of any portions of the said water-works, or agreeing with any person or corporation for furnishing material or apparatus therefor.

65 3rd. And it is further mutually understood and agreed by and between the company and the city, that a penalty bond this day executed by the Knoxville Water Company as principal and Sam McKinney as surety, to the board of mayor and aldermen of the city of Knoxville, conditioned in the sum of twenty-five thousand dollars, for the construction at and within the limits of the city of Knoxville—a system of waterworks in accordance with the plans and specifications of Moses Lane, or in case of failure to pay, satisfy and discharge all such damages as said board may sustain in consequence of said failure is hereby referred to and made a part of this agreement.

4th. And it is further mutually understood and agreed by and between the said company and the city, that article one of section one of this agreement be amended so as to require that the system of water-works hereinbefore provided for shall be built and constructed in accordance with the plans, specifications of Moses Lane with a single exception, that is to say: Instead and in place of the stand-pipe for fire purposes, at the reservoir as required and contemplated by the plans and specifications of Moses Lane, the said company shall construct and establish at the reservoir a system of by-pass pipes by means of which the water in case of fire may be directed into the proper main by the direct pressure of the engine of the works.

In testimony whereof, the said Knoxville Water Company, has caused this agreement to be signed on its behalf by its president and secretary, and the said board of mayor and aldermen of the city of Knoxville, has caused this agreement to be signed on its behalf by the mayor and recorder of the city of Knoxville, and has

66 affixed hereto its common seal on the day and year above written.

(Signed) S. E. COOKE,
President Knoxville Water Co.
ALVIN BARTON,
Sec'y *pro Tem.*
R. S. PAYNE, Mayor.
C. C. NELSON, Recorder.

{ Seal Mayor & Aldermen of the City of Knoxville, Tenn., Founded 1792. }

KNOXVILLE, TENNESSEE:

Bond of Knoxville Water Company, 1882.

Filed July 1, 1882.

Know all men by these presents, that we, the Knoxville Water Company, a body politic and corporate as principal and Sam McKinney, a resident of Knoxville, Tennessee, as surety are firmly bound and held unto the board of mayor & aldermen of the city of Knoxville, in the penal sum of twenty-five thousand dollars.

Now the condition of this bond is such that—the said Knoxville Water Company shall within the period of twelve months from July 1, 1882, construct, erect and establish at and within the corporate limits of the city of Knoxville, Tennessee, a system of water works in accordance with the plans and specifications of Moses Lane, or in case of failure therein, shall pay, satisfy and discharge all such damages as the said board of mayor & aldermen as a corporation, shall incur or sustain in consequence of such failure, then and in that event, this obligation shall be null and void, otherwise to remain in full force.

67 In testimony whereof, the said Knoxville Water Company has caused the signature of its president and secretary to be hereto affixed in its behalf, and the said Sam McKinney has hereunto set his hand this July 1st, 1882.

(Signed) S. E. COOKE,
President Knoxville Water Co.
A. BARTON,
Sec'y *pro Tem.* of Knoxville Water Co.
SAM McKINNEY, Surety.

{ Seal Mayor and Aldermen of the City of Knoxville, Tennessee, Founded 1792. }

Filed July 1, 1882.

STATE OF TENNESSEE, }
City of Knoxville. }

I, C. C. Nelson, recorder of said city, do hereby certify the foregoing to be a full, true and perfect copy of the contract it purports to give, made by the city with the Knoxville Water Company, together with the bond of said company, as the same appears of record on the minutes of the mayor & aldermen of said city now in my office.

Given under my hand at office in Knoxville, Tenn. July 21st, A. D. 1904.

[SEAL.] C. C. NELSON, Recorder.

Endorsed: Knoxville Water Co. *vs.* City of Knoxville, *et al.* Exhibit No. 3. Filed Aug. 5, 1904. J. T. Carter, deputy clerk.

6—123

68 EXHIBIT No. 4.

KNOXVILLE, TENN., Thursday, Feb'y 9th, A. D. 1888.

Hon. Mayor Condon issued a call for a meeting of the board of mayor and aldermen, which notice was served on every one of the members of the board who was reported absent from the city.

In answer to said call there appeared at the city hall at four o'clock p. m., Aldermen Selby, Barry, Hockenjos, Boyd, (Condon) Jones, Albers, Perry and McDonald. Also present City Attorney J. W. Sneed, Esq., Chm. Young, Mr. Kern and Fulcher of the board of public works. Also J. W. Yoe and Mayor Gratz, attorneys for the city in the water works case. Mayor Condon called the board to order, and after roll call, read his message as follows:

KNOXVILLE, TENNESSEE, February 9th, 1888.

To board of aldermen.

GENTLEMEN: You have been called together to consider a proposition of compromise in settlement made by the water works company to this board. To consider a resolution empowering and authorizing the mayor to make arrangements relative to our finances and appoint a committee to investigate the extension of Gay street and to consider the ordinances introduced by Aldermen Hockenjos in second reading in reference to minors.

Very respectfully,
(Signed) MARTIN J. CONDON.

69 City attorney being called, read the following:

"Whereas, there is and has been pending between the Knoxville Water Co. and the board of mayor and aldermen of the city of Knoxville, litigation over a contract made between said parties on the 1st day of July 1882,

And whereas, the Knoxville Water Co. has submitted a proposition to settle all differences between the parties to said contract, which proposition is in the words and figures following, to-wit:

KNOXVILLE, TENN, Feb'y 9th, 1888.

To the mayor and aldermen of Knoxville, Tenn.

GENTLEMEN: Pursuant to an interview the representatives of the Knoxville Water Co. have had with the mayor and the members of the board of public works, and for this purpose of settling and compromising all differences between the Knoxville Water Co. and the city, we submit the following proposition of settlement:

1. The city is to pay the Knoxville Water Co. in cash all the hydrant rental due to Jan'y 1st, 1887, not heretofore paid, with interest from the dates it fell due.

2. The city will give the Knoxville Water Co. an obligation for all rental of hydrants accrued since Jan'y 1st, 1887, which obliga-

tion shall be paid out of the first monies that can be made available for that purpose.

3. The Knoxville Water Co. will surrender and convey to the city, any supposed claim it has to the telegraph fire alarm put in by the Knoxville Water Co.

4. The Knoxville Water Co. shall not be under any obligation to repair, erect, maintain or care for a telegraph fire alarm system for the city of Knoxville and the city shall from this date look
70 after and bear all the expenses that may be in any way connected with the maintenance, care or repairs of any telegraph fire alarm it may erect. It being intended that the Knoxville Water Co. shall in no way be responsible for a telegraph fire alarm of any kind, as provided in the contract between the city and the Knoxville Water Co.

5. The Knoxville Water Co., upon its part, agrees to pay over to the board of public works, at once, three thousand seven hundred and fifty dollars of the obligation to be given for the hydrant rentals falling due for the year 1887, for the purpose of assisting the city in erecting a telegraph fire alarm.

6. The hydrant rental shall go on and be paid as provided in the contract between the city and the water Co., at the rate of fifty dollars per year for each hydrant up to one hundred and the rental of each hydrant over one hundred shall be at the rate of forty five dollars per year, payable quarterly as provided in the original contract above alluded to.

7. The suits now pending against the city are to be dismissed and the city will pay all the costs accrued.

Respectfully submitted,

KNOXVILLE WATER COMPANY,
By R. N. HOOD, Pt.

(Under seal of Knox. Water Co.)

Endorsed: Proposition Knoxville Water Co. to board of mayor and aldermen.

Printed: Taylor & Hood, attorneys & counsellor-, Knoxville, Tennessee.

Immediately after the reading of the foregoing ptoposition Aldermen Hockenjos offered the following:

Therefore, be it resolved by the Board of Mayor and Aldermen of the City of Knoxville, that the said proposition is hereby
71 accepted, and the mayor and recorder and the board of public works are hereby directed to carry the same into effect.

Aldermen Albers asked to hear from the board of public works. Ch'm- Young stated the above was the best proposition that the Knoxville Water Co. had offered the city, and he thought it the best settlement that could be made for the city.

Aldermen Albers seconded motion to adopt above resolution.

J. W. Yoe, Esq., and Maj. Gratz being present, were called and as they had acted as counsel for the city in the water works suits against the city, after giving a history of the case decided by the supreme court of Tennessee, stated that taking everything into consideration, the proposed settlement was in their opinion the best that could be made under the circumstances. In fact they had advised his honor to accept the proposition $25000 from the water Co. for fire alarm system, but his honor had succeeded in getting a better offer from said Co. for the city, which they thought the board could not do better than to accept at once, and get rid of the lawsuits now under way.

The question was called, on motion of Aldermen Hockenjos to accept said proposition and pass above resolution. The roll being called, Aldermen Selby, Barry, Hockenjos, Boyd, Jones, Albers, Perry and McDaniel voting aye. Mayor Condon declared the contract adopted and resolution carried.

I, C. C. Nelson, recorder of the city of Knoxville, do hereby certify the foregoing to be a full, true and perfect copy of the proceedings of the board of mayor and aldermen of said city which it purports to give, as the same appears of record in my office in
72 the minutes of said board, bearing date Feb'y 9, 1888.

Given under my hand, July 21st A. D. 1904.

[SEAL.] C. C. NELSON, Recorder.

Endorsed: No. 4. Knoxville Water Co. *vs.* City of Knoxville, *et al.* Exhibit No. 4. Filed Aug. 5, 1904. J. T. Carter, deputy clerk.

EXHIBIT No. 5.

At the regular meeting of the mayor and aldermen of North Knoxville held Saturday April 18th, 1891, amongst other proceedings of said board an ordinance was passed on its last reading and became a law, in words following:—(See Minutes 358 to 367 inclusive.)

Ordinance.

An Ordinance to Provide for a Supply of Water to the Town of North Knoxville and Its Inhabitants, and to Authorize the making of a Contract for the Same with Wheeler and Parks.

SECTION 1ST. Be it ordained by the town council of North Knoxville, That in consideration of the public benefit to be derived therefrom, the right and privilege is hereby granted, until June 3rd, 1913, unto Wheeler and Parks of Boston in the Commonwealth of Massachusetts, their successors and assigns, (they being hereinafter designated as grantees) of erecting, maintaining and operating a system of water works, and to extend the mains, and
73 to enlarge the plant at their pleasure in accordance with the

terms and provisions of this ordinance, and of using the avenues streets, alleys, bridges, public squares, and all public grounds within the corporate limits of the town of North Knoxville as they now exist, or may hereafter be extended or created, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good, clear and wholesome water, suitable for domestic and manufacturing purposes, to the town of North Knoxville and its inhabitants for public and private uses subject to all reasonable requirements of the town council of North Knoxville; and for making repairs to said system from time to time during the period in which this ordinance and contract hereinafter authorized are in force.

The privileges hereinafter granted, so far as they relate to furnishing water for hydrant service, to be exclusive so long as the total number of hydrants rented hereunder does not exceed fifty (50).

SECTION 2ND. Be it further ordained, That the said grantees shall exercise the greatest care and diligence in the use of said avenues, streets, alleys, bridges, and public places and shall cause no unnecessary obstructions of or interruption to, the public travel over or upon the same, or any permanent injury to, or interference with any pipes, mains, or sewers, which may be lawfully located beneath the surface thereof, now, or at the time any of the extensions
74 herein provided for are made. Said grantees shall take every precaution to provide against injury to any person or property by reason of the exercise of the rights and privileges hereby granted, and shall cause all excavations and obstructions to be properly lighted at night, and take all necessary precautions for the prevention of accidents, whether prescribed by ordinance or not, and shall restore all avenues, streets, alleys and public places, when worked or used, to their former condition as near as may be without unnecessary delay, and at the least inconvenience to the inhabitants of the town of North Knoxville; and the said grantees shall indemnify and save the town harmless from any and all damages that may be recovered against it by reason of their negligence while engaged in constructing or repairing said works within the corporate limits of said town of North Knoxville or by reason of any defect therein.

SECTION 3RD. The water to be supplied under the contract hereby authorized, shall be from the Tennessee river, or from other source equally suitable, and shall be supplied from the same system that supplies the city of Knoxville, or otherwise as said grantees shall elect (and said grantees shall adopt, within two years from the time the contract takes effect, all necessary and proper means of filtering, or otherwise clarifying the same, so as to render it pure and wholesome), and it is hereby stipulated that the water to be supplied hereunder shall be taken from a point above Williams creek, whenever the city of Knoxville shall be so supplied.

75 SECTION 4TH. The pipe to be laid hereunder shall range from four (4) inches to twelve (12) inches interior diameter, or larger. Not more than one hydrant shall be set upon any section

of four (4) inch pipe, in which case said section shall be supplied at each end through larger pipes, and all pipes shall be of ample size, and so arranged as to furnish a full supply of water under the minimum pressure, and to meet the tests herein provided. All pipes to be of cast iron and tested at the foundry to a pressure of three hundred (300) pounds to the square inch, and thoroughly coated in accordance with the most approved method employed in modern practice in the coating of water pipes.

SECTION 5TH. The valves shall be located at such points as will admit of not over three blocks being isolated from the balance of the system in case of needed repairs or extensions.

SECTION 6TH. The hydrants shall be frost proof, double nozzle of most approved pattern, with hose tips fitted to connect with such hose couplings as the town council of North Knoxville may adopt.

SECTION 7TH. The grantees will lay mains wherever, and to such extent, as may be required by order of the town council of North Knoxville, be the same more or less, and will set thereon fire hydrants of approved pattern at the rate of one hydrant for each six hundred feet of pipe so ordered and laid; said hydrants to be located at such
76 points on said pipe as said town may elect; and said grantees will supply the same with water free of charge (for the purposes recited in section 13) until June 1st. 1892, and thereafter until said company shall have clarified by filteration, precipitation or otherwise, the water to be supplied hereunder.) Thereafter the rate to be paid by said town of North Knoxville for the use of said hydrants shall be forty-five ($45.00) dollars, each per annum, payable quarterly, but shall not at any time exceed the rate paid by the city of Knoxville for hydrant service, upon extension made within the limits of the said city of Knoxville.

SECTION 8TH. And the said grantees further agree to improve the works and increase the plant from time to time to any extent which may be needful to enable them to furnish an ample supply of good potable water as provided in section 3, for public and manufacturing, and domestic use of the entire district of North Knoxville, which supply shall not be less than fifty (50) gallons per head per day, if required for the entire population, including any increase thereof, it being provided that there shall be no unnecessary waste; and to furnish each and every suburb in the vicinity of North Knoxville with water upon no less favorable terms than shall from time to time govern its use in the city of Knoxville.

SECTION 9TH. The water to be furnished private consumers, shall be charged for at not exceeding the rates contained in the following schedule:

77 **Tariff of Water Rates.**

Annual Rates

Private dwellings occupied by one family—

Four rooms or less	*6.00*
Five "	7.00
Six " more	8.00 and upwards.
Baths—Bath tubs, private	5.00
Public	10.00
Water closets—Private	5.00
Public	10.00
Urinals—Private	5.00
Public	10.00
Stores—According to occupation and use	8.00 and upwards.

Rooms over store, according to occupant.

Offices in buildings where water is generally used	8.00
Banks	8.00
Insurance offices	8.00
Saloons—Special.	
Photograph galleries	15.00 to 50.00
Dentists' offices	10.00 to 20.00
Hotels and boarding houses—	

Hotels and boarding houses—special or meter rates.

Stables—Livery and sales stables (hose privilege extra) per stall	2.00
Private stables—per stall	2.00
Bakeries—per each barrel of flour used daily	5.00
Printing offices—exclusive of engine	10.00 to 25.00
Steam engines—per horse power	2.50
Restaurants	25.00 to 100.00
Barber shops—First chair	5.00
Each additional chair	2.00

Fountains—six hours per day for seven (7) months—

1/16 inch jet	5.00
1/8 inch jet	8.00
3/16 " "	12.00
5/16 " "	45.00
Building purposes—Laying bricks per thousand	.10
" stone " cu. yard	.04
Plastering per 100 square yards	.35

Sprinklers and street washers—from April 1st to November 1st.—Sprinkling governed by number of lineal feet front, including privileges of washing windows and side walks and sprinkling lawn and street in front of your own premises—

Dwellings with lawn, &c., as above, for each 50 ft. front for season..... 8.00

No contract made for less than one year.

Business houses, for each 25 feet front for the season..... 8.00

Meter Rates.

For Manufacturing and Mechanical Purposes.

0 to 200 M. gallons monthly at	.....	10 cents per M.
200 to 300 "	.....	9 "
Above 300 "	.....	8

78 For all other purposes not otherwise provided for, the rate will not exceed twenty five (25) cents per thousand gallons—subject to the following discounts

On quarterly bills of $10 to $25 discount 5 per cent.

25	50	10
50	75	15
75	100	20
100	125	25
125	150	30
150	175	35
175	200	40
200	250	45
Exceeding	250	50

Providing that the minimum meter charge shall not be less than $10.00 per annum.

Making connections:

For making connections for private supply the following charges shall be made—

½ inch pipe galvanized iron.....	$8.00
¾ " " "	10.00
1 " " "	14.00

For lead pipe special rates will be given at the time according to the market price.

Black iron gas pipe is not allowed.

SECTION 10TH. The grantees further agree that they will, within a reasonable time, not exceeding three (3) years after the granting and acceptance of this ordinance, provide a high service system, and hereby agree that said system shall be capable of furnishing five (5)

streams of water from the fire hydrants, through two hundred (200) feet of hose and one (1) inch nozzles, thrown simultaneously to an average vertical height of not less than forty (40) feet. Said streams to be taken from the five highest hydrants in the town of North Knoxville; (and they further agree that for all hydrants set under the provisions of this ordinance that do not indicate a pressure of twenty-five (25) pounds, or more per square inch, as indicated
79 by a pressure gauge they will make no charge for rental for said hydrants until said high service shall have been established.

SECTION 11TH. The said grantees further agree that within thirty (30) days after the town council has ordered and located the first installment of hydrants hereunder, and shall have notified said grantees in writing to that effect, they will place an order for pipe, hydrants &c. with reliable foundries and manufactories; and immediately upon the delivery of such pipes, hydrants, &c. will proceed to lay and supply the same with water, and will complete the same within ninety (90) days after said pipes &c. shall have been received; and will thereupon furnish water through the same to said town of North Knoxville, it being provided that said pipes shall be laid and water shall be furnished within six (6) months after said first installment of hydrants shall have been ordered. In the event of their failure to perform the agreements provided in this section, said grantees will forfeit to the town of North Knoxville the sum of one thousand ($1000) dollars as liquidated damages.

SECTION 12TH. In consideration of the benefits to accrue to it and its citizens the town of North Knoxville agrees to, & hereby rents from the said grantees the fire hydrants above mentioned, until June 3rd, 1913, at an annual rental of forty-five ($45.) dollars per hydrant, payable quarterly on the first days of January, April, July and October. Subject to the final provisions of section 7.

80 SECTION 13TH. Said grantees shall extend the mains or lines of pipe whenever requested by North Knoxville, and North Knoxville will rent an additional hydrant for every six hundred (600) feet thereof, at forty-five ($45) dollars per year, payable quarterly, subject to the conditions of section 7; and water may be used from said hydrants for the extinguishment of fires, and for fire protection for necessary practice and drill of fire companies and for flushing and washing all gutters and sewers, now or hereafter built, without payment other than the forty-five ($45.) dollars per hydrant hereinbefore fixed; but in flushing gutters and sewers, not more than one hydrant shall be opened at one time; and said use shall be limited in all cases, to one hour per week for each mile of main laid within the limits of the said town of North Knoxville; and in no case shall flushing be done during a fire in Knoxville, or any of its suburbs.

SECTION 14TH. The grantees shall supply water, not exceeding 5,000 gallons per day, for one ornamental fountain at such point as the town council may designate; and also water for one public

watering trough for man and beast; the cost of their erection to be paid by North Knoxville; and shall also furnish water for two public school buildings, and for the use of the city hall; and for the water to be so furnished, North Knoxville will pay as rental a sum equivalent to the taxes assessed by it against said grantees for the first five years; said rental to be due and payable on the same date taxes may be due; and after the expiration of five (5) years, as herein provided, said grantees shall continue to furnish water as herein provided free of charge, and pay the taxes properly
81 assessed against them.

Said grantees shall furnish water free of cost to each of the churches in said town of North Knoxville, the same to pass through self closing fixtures; the expense of which together with all pipe and connections, and the work of inserting the same, to be borne by said churches respectively.

SECTION 15TH. That North Knoxville will enact all needful and requisite ordinances, within its power to do so, to protect the works and property of said grantees from damage, fraud or imposition.

That any person or persons, or corporation which shall take or use any water from the works of said grantees, for domestic use, or other purposes without contracting for the same, shall be guilty of a misdemeanor and upon conviction shall be fined not less than five ($5.00) dollars nor more than fifty ($50) dollars.

The said grantees shall have the right to shut off the water temporarily from the mains, or any portion thereof, for the purpose of making repairs, or extensions to the works, provided notice is given of the intention to cut off the water, and such repairs and extensions are made without delay, and with due diligence, but if at any time the water is shut off from any cause for more than five days at a time the rental of hydrants shall cease during the time of suspension, and no citizen who is cut off shall be liable to pay for like time.

82 SECTION 16TH. In the event of the construction of a system of sewers by the town of North Knoxville, as it is now, or may be hereafter extended, said grantees will furnish, free of charge, the necessary water to flush sewers by means of a proper, efficient and well regulated system of flushing tanks, or any other well regulated and economical method; to be constructed by the town.

SECTION 17TH. The authorities of the town to whom said duty pertains under the ordinances of the said town of North Knoxville, shall have the right to inspect the fire hydrants at any time; and in case it shall be ascertained by such inspecting, that any of the hydrants are out of repair, or otherwise inefficient for the purposes for which they are erected, the town shall have the right to order the hydrant to be repaired, and shall at once notify the grantees, designating the defect, and if within two (2) days from the receipt of such notice the said grantees do not attend to, such repairs, the town may have the same repaired at its own expense, and may de-

duct from the rental due from it to the grantees the cost of such necessary repairs.

SECTION 18TH. In case of accident to the works of said grantees, the works shall be repaired as speedily as possible, and in case it shall fail to supply water for three (3) months at any time, it shall forfeit six (6) months' hydrant rental of all hydrants not supplied. It being provided that the works to be constructed hereunder are to be in accordance with the most approved practice of modern
83 art, and the pipes, hydrants, valves, &c. are to be of standard make, and subject to the most approved tests before being used in the works, and the grantees shall maintain the water works in such manner as to enable them to comply with the terms of this contract during the entire period thereof.

SECTION 19TH. Be it further ordained that within fifteen (15) days after this ordinance takes effect, the grantees shall file their written acceptance of the same in the office of the recorder of North Knoxville, and upon this being done, this ordinance shall become the contract between the town of North Knoxville and the said grantees, their successors or assigns, the same and as fully as if its provisions were embodied in a formal written contract, made and executed between the parties. And the said grantees shall within said last named fifteen days file with the recorder a good and solvent bond in the sum of five thousand ($5000) dollars, properly conditioned for the faithful performance of the contract herein contained, and also containing a clause, or condition providing that if said grantees shall fail to perform their agreements as contained in section 11 of this ordinance within the time therein specified, said grantee- shall forfeit to the town of North Knoxville the sum of one thousand ($1000) dollars, as liquidated damages for such failure, and they shall be also liable for damage that may accrue from any other breach of the contract herein contained.

In case of failure or neglect on the part of the grantees to
84 furnish an adequate supply of good, clear wholesome water for private and public uses during a period of six (6) months after official notice shall have been given by said town of North Knoxville, except as provided in section 3, then all rights under this ordinance, at the election of said town, shall cease and determine; it being understood and agreed that this shall not apply in any case where the failure or neglect to supply water as aforesaid for six months, is from any cause beyond the control of said grantees.

SECTION 20TH. Said grantees may assign this contract to any water company now organized (or to be hereafter organized) under the laws of the State of Tennessee, and who may become their successors, and said company, whether now organized or to be hereafter organized, may make a mortgage covering any or all portions of its plant, and may issue its bonds thereon. And said grantee- or any water company to whom they may assign this contract, may purchase the franchise and property of any other water company.

The said grantees may extend their mains, at their pleasure, out-

side the corporate limits of North Knoxville, and may make contracts with, and supply water to any person or persons, and any private or municipal corporation from the system of water works herein contracted for. Provided the supply to North Knoxville as herein contracted for shall not be diminished thereby.

SECTION 21ST. It is hereby provided that should the said grantees be prevented from performing any of their agreements as provided for in this contract, including those in section 11, by any legal
85 or judicial interference, by any strike or accident beyond their control, by any public calamity, or when prevented from so doing by any act of the town council of the said town of North Knoxville they shall not be holden, but such additional time shall be granted as shall reasonably cover such interference.

SECTION 22ND. It is further agreed that in case said grantees shall fail to furnish water as contemplated by this contract in section 11, for public and private purposes within twelve (12) months from date of ordering the first installment of hydrants as provided in sec. 11, then all franchises and privileges herein granted, shall become forfeited without further notice; and this contract shall be null and void at the election of North Knoxville, but in declaring the same void the city shall not be deemed to have waived any right of action on the bond executed by said grantees for damages provided by this contract.

SECTION 23RD. And the said grantees hereby agree that they will immediately apply for a charter under the laws of the State of Tennessee authorizing the construction of the system of water works as herein provided, and organizing a company thereunder when the same shall have been granted, to whom this contract shall be assigned.

And the said town of North Knoxville hereby agrees to perform all such acts and things as are required of it in such cases under the laws of the State to perfect the charter.

The grantees may, however, if they should elect not to organize a new corporation, assign this contract as provided in sec. 20, hereof.

86 SECTION 24TH. Be it further ordained That all ordinances or parts of ordinances in conflict with this ordinance be and the same are hereby repealed.

SECTION 25TH. Be it further ordained That this ordinance take effect from and after its passage, the welfare of the corporation demanding it.

I, C. C. Nelson, recorder and treasurer of the city of Knoxville, Tennessee, & custodian of the books & papers of said city, do hereby certify the foregoing to be a full, true & perfect copy of the ordinance it purports to give as passed by the M. & A. of North Knoxville, as the same appears of record on the minutes of said board now on file in my office.

Given under my hand and the seal of the city of Knoxville, Tennessee, August 1, A. D. 1900.

C. C. NELSON,
Recorder & Treasurer.

Endorsed: No. 5. Knoxville Water Co. *vs.* City of Knoxville, *et al.* Exhibit No. 5. Filed August 5, 1904, J. T. Carter, deputy clerk.

87 EXHIBIT No. 6.

STATE OF TENNESSEE:

Charter of Incorporation.

Be it known, that D. S. McIntire, H. E. Holmes, Daniel Kelley, William M. Baxter, and H. P. Coile (all of whom are more than twenty one years of age) are hereby constituted a body politic and corporate by the name and style of "The Lonsdale-Beaumont Water Company" for the purpose of establishing and constructing water works adjacent to and in the town of West Knoxville, in Knox county, Tennessee; and it shall be the duty of said company to build water works and provide machinery in or adjacent said town and of sufficient capacity to supply said town and the inhabitants thereof with a plentiful supply of water and for this purpose said company is hereby authorized and empowered and invested with the privilege to lay down pipes and to extend acqueducts and conductors through any or all the streets, lanes or alleys of said town and to supply the inhabitants of said town with water by public works and for the purpose of laying down such pipes, acqueducts and conductors, said company may take up the pavements or sidewalks upon such street- after permission has first been obtained from the corporate authorities of said town, provided, that said pavements and sidewalks shall be taken up in such manner as to give the least inconvenience to the inhabitants of said town, and that the same shall be replaced with all convenient speed by and at the expense of said company in as substantial manner as found before taking up.

88 The works and operation of said company shall be so constructed and managed as not to effect the health or comfort of said town prejudicially; and nothing in the charter shall be so construed as to absolve said company from legal proceedings to restrain or abate any nuisance arising from its operations.

If any person shall injure or destroy any portion of the fixtures or other works or property belonging to said company or shall wilfully open any communication into the street or other water pipes or let on water after it has been stopped by the company, such person or persons shall be liable for all damages sustained by such proceedings, and also a penalty not exceeding five hundred ($500.00)

dollars upon conviction before a court having jurisdiction of the offense.

If any person or persons shall take or use any of the water of said company for domestic or other purposes without having previously contracted for the same with the officers of said company, such person or persons shall forfeit and pay to said company the sum of fifty ($50.00) dollars to be recovered before any justice of the peace in the same manner as other debts are collected by law; provided, that nothing herein contained shall be construed to compel the inhabitants of said town to use the water so introduced by said company or prevent them from using water obtained in any other way.

If any person or persons shall wilfully corrupt or commit anything to run into or fall into any stream or reservoir from which the said company shall take water to be introduced into said cities or village which shall corrupt the same or render it unpalatable, unwholesome or unfit for domestic or manufacturing purposes or use, or for the supplying of stationary or locomotive engines, or shall bathe in any dam or reservoir, lead or enter any animal into the same on being convicted thereof before any justice of the peace of the civil district in which the said water is situated, shall pay a fine of not less than ten ($10.00) nor more than fifty ($50.00) dollars, one half to the use of the informer, the other half to the use of said company and shall moreover remain liable to said company for all damages.

Said company is hereby empowered and authorized to condemn and take such lands as may be necessary for the establishment of their reservoir and works, and the rights of way through all lands between its reservoirs and the said town to lay its pipes, acqueducts or conductors, and keep the same in repair, is hereby granted to said company: Provided, that such pipes and conductors shall be laid in such manner as to do as little injury to the property of private persons as possible; and provided further that said company shall make compensation to the owners of the real estate condemned or taken, or through which the pipes, conductors or acqueducts may be laid. If the owner and said company cannot agree upon the amount of compensation which shall be paid the same shall be assessed in the manner provided by the Code of Tennessee (1858), section 1325 to 1348 inclusive.

Said company is hereby vested with all the powers and privileges, and shall be governed by all the restrictions incorporated in section 5 of the acts approved March 23rd. 1895, to-wit: the general powers of said corporation are:

1. To sue and be sued by the corporate name.

2. To have and use a common seal which it may alter at pleasure, if no common seal, then the signing of the name of the corporation, by any duly authorized officer, shall be legal and binding.

3. To purchase and hold by gift, in addition to the personal property owned by said corporation, any real estate necessary for the transaction of the corporate business and also to purchase or

accept any real estate in payment or part payment of any debt due to the corporation, and sell realty for corporation purposes.

4. To establish by-laws and make all rules and regulations not inconsistent with the laws and the constitution, deemed expedient for the management of corporate affairs.

5. To appoint such subordinate officers and agents, in addition to the president, secretary or treasurer as the business of the corporation may require.

6. To designate the name of the office and fix the compensation of the officers.

7. To borrow money, and issue notes or bonds upon the faith of the corporate property and also to execute a mortgage or mortgages as further security for repayment of money thus borrowed.

The following provisions and instructions are coupled with said grant of powers:

1. A failure to elect officers at the proper time does not dissolve the corporation, but those in office hold until the election, appointment and qualification of their successors.

2. The term of all officers may be fixed by the by-laws of the corporation, the same not, however to exceed two years.

3. The corporation may by the by-laws make regulations concerning the subscription of or transfer of stock; fix upon the amount of capital to be invested in the enterprise; the division of the same into shares; the time required for the payment thereof by the subscribers for stock; the amount to be called at any one time,
91 and in case of failure of any stockholder to pay the amount thus subscribed by him at the time in the amount thus called a right of action shall exist in the corporation to sue said defaulting stockholder for the same.

4. The board of directors which may consist of five or more members at option of the corporation to be elected either in person or by proxy by a majority of the votes cast, each share representing one vote; shall keep a full and true record of all their proceedings and an annual statement of receipts and disbursements shall be copied on the minutes subject at all times to the inspection of any stockholders.

5. The books of the corporation shall show the original and subsequent stockholders, their respective interests, the amount which has been paid on the shares subscribed, the transfer of stock by and to whom made; also other transactions — which it is presumed a stockholder or creditor may have an interest.

6. The amount of any unpaid stock due from a subscriber to the corporation, shall be a fund for the payment of any debts due from the corporation, nor shall the transfer of stock by any subscriber relieve him from payment unless his transferee has paid up all or any of the balance due on original subscription.

7. By no implication or construction shall the corporation be deemed to possess any powers except those hereby expressly given or necessarily implied from the natire of the business, for which the

charter is granted, and by no inference whatever shall said corporation possess the power to discount notes or bills, deal in gold or silver coin, issue any evidence of debt or currency buy or sell
92 any agricultural products, deal *deal* in merchandise or engage in any business outside the purpose of the charter.

8. The right is reserved to repeal, annul or modify this charter. If it is repealed or if the amendments proposed being not merely auxiliary but fundamental are rejected by a vote representing more than half of the stock; the corporation shall continue to exist for the purpose of winding up its affairs; but not to enter upon any new business.

If the amendments or modifications, being fundamental are accepted by the corporation as aforesaid, in a general meeting called for that purpose, any minor, married woman or person under disability or any stockholder not agreeing to the acceptance of the modifications shall cease to be a stockholder and the corporation shall be liable to pay said withdrawing stockholders the par value of their stock if it is worth so much; if not, then so much as may be its real value in the market on the day of the withdrawal of said stockholders as aforesaid, provided the claims of all creditors are to be paid in preference to said withdrawing stockholders.

9. A majority of the board of directors shall constitute a quorum; and shall fill all vacancies until the next election. The first board of directors shall consist of the five or more corporators who shall apply for and obtain the charter.

10. The said corporation may have the right to borrow money monthly and issue notes and bonds upon the faith of the corporate property, and also to execute a mortgage, or mortgages for the further security for the repayment of money thus borrowed.

We, the undersigned apply to the State of Tennessee by virtue of the laws of the land, for the foregoing charter of incorpo-
93 ration under the acts of March 23rd. 1875, and its various amendments.

Witness our hands this 1st. day of July, 1891.

1. D. S. McINTYRE.
2. H. E. HOLMES.
3. DANIEL KELLEY.
4. WILLIAM M. BAXTER.
5. H. P. COILE.

Witness:
E. C. GOTHARD.

STATE OF TENNESSEE, }
Knox County. }

Personally appeared before me, W. T. Jones, deputy clerk of the county court of Knox county aforesaid, E. C. Gothard the subscribing witness to the annexed charter, who, being first sworn, deposes and says that he is acquainted with D. S. McIntyre, H. E. Holmes,

Daniel Kelley, William M. Baxter and H. P. Coile, the corporators and that they acknowledge the same in his presence to be their act and deed on the day it bears date.

Witness my hand at office in Knoxville the 20th. day of July 1891.

[Seal of the Co. Court, Knox Co., Tennessee.]

W. T. JONES,
Deputy Clerk.

Be it known, that by virtue of a resolution of the corporate authorities of West Knoxville, leave has been had and obtained authorizing the foregoing proposed water company to operate its proposed water works within the corporate limits of West Knoxville, and that as directed and empowered by said resolution, I,
94 John W. Yoe, mayor of the town of West Knoxville do so hereby certify, and for said town assent to the foregoing application for the charter herein applied for by D. S. McIntyre and others. This 1st. day of July 1891.

JOHN W. YOE,
Mayor of West Knoxville.

Received for record the 21st. day of July 1891, at 10 o'clock a. m., recorded July 22nd. 1891.

M. A. M. ARMSTRONG, Register.

I, Chas. A. Miller, secretary of the State of Tennessee, do certify that the foregoing instruments with certificates of acknowledgment of probate and registration *was* filed in my office for registration on the 28th. day of July 1891, and recorded on the 28th. day of July 1891, in Corporation Record Book, PP in said office, page 151.

(Here the Great Seal of the State of Tennessee.)

In testimony whereof, I have hereunto subscribed my official signature and by order of the governor affixed the great seal of the State of Tennessee, at the department in the city of Nashville, this 28th. day of July, A. D. 1891.

C. A. MILLER,
Secretary of State.

This certificate, together with the great seal of the State of Tennessee, was received the 29th. day of July, 1891, at 9 o'clock a. m. and recorded same day.

M. A. M. ARMSTRONG, Register.

REGISTER'S OFFICE,
Knox Co., Tenn.

I, Rob't Brice, register of said county, do certify that the foregoing is a full, true and perfect copy of the charter from State of

Tennessee to the Lonsdale-Beaumont Water Co., as the same appears of record in this office in Book 110, page 343.

Witness my hand at office in Knoxville, this 20th. day of July, 1904.

ROB'T BRICE, Register,
By JNO. W. SNEED, Dep'y.

Endorsed: Knoxville Water Co. *vs.* City of Knoxville, *et al.* Exhibit No. 6, Filed Aug. 5, 1904, J. T. Carter, deputy clerk.

95 EXHIBIT No. 7.

At a meeting of the town council of West Knoxville, held at the city hall, September 17th. 1892, amongst other proceedings, the following ordinance was passed, and became a law, in words, to-wit: (See Record Book, page 193 to 208, inclusive.)

An ordinance to provide for a supply of water to West Knoxville, county of Knox, State of Tennessee, and to its inhabitants, and contracting with Lonsdale-Beaumont Water Co. for a supply of water for public and private use.

Be it ordained by the town council of West Knoxville.

SECTION I. That in consideration of the public and private benefit to be derived therefrom the right and privilege is hereby granted for the period of twenty (20) years from the time this ordinance takes effect, unto Lonsdale-Beaumont Water Company, (hereafter called grantees) of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and using the streets, alleys, ways, public squares and all other public places within the corporate limits of said West Knoxville, as they now exist or may hereafter be extended (and with such other territory as may now or hereafter come under the jurisdiction by addition or otherwise) for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good wholesome water in said West Knoxville, and to its inhabitants, for public and private use, and for making extensions, additions and repairs to said system, from time to time, during the period for which this ordinance shall continue or be in force.

96 SEC. II. The said grantees shall exercise all reasonable care and diligence in the use of said streets, alleys, ways and public places, and shall cause no unnecessary obstructions of or interruption to the public travel over and upon the same, or any unnecessary injury to or interference with any pipes or sewers, which may be now, or hereafter lawfully located beneath the surface thereof, and said grantees shall also take every reasonable precaution to provide against danger to life and limb by reason of the exercise of the rights

and privileges hereby granted, and shall cause all excavations and obstructions to be properly lighted and guarded at night, and after the completion of the purposes for which said streets, alleys, ways, public squares and other public places may be used, they shall be carefully tamped and restored to their former condition, as near as may be, without unnecessary delay, and said grantees hereby agree to hold said West Knoxville harmless from any liability which may result to it, by reason of any violation of this section.

SEC. III. The general plan of this system of water works shall be as follows, viz:

Rates.

The pipe system shall consist of not less than five and one-quarter (5¼) miles of pipe, to be of sizes, varying from four (4) to twelve (12) inches interior diameter, and to be laid on such streets, alleys, avenues, ways and public places, as may be designated by the council, after inspection of the plan of pipe line to be hereafter submitted to said town council by said grantees; said council to have the right to confer with a competent civil engineer—and upon which said city may wish to locate hydrants, said pipes to be so located as to form complete circuits in said system, provided, that not more than
97 two hydrants shall be located on a continuous line of four inch pipe, unless the pipe has more than one connection with the large sized pipe; provided, further, however, that said grantees shall have the right to locate and lay their pipes upon any street, avenue, alleys, ways and public places, as they may desire in order to furnish private consumers with water. Provided, further, that grantees shall observe all precautions and be governed by said liabilities in laying such as others, under direction of the council.

All pipes laid to be of standard or heavy weight, and tested at their places of manufacture to withstand a pressure of (300) three hundred pounds per square inch, and to be coated with Dr. Angus Smith's preservation varnish.

The city shall have the right upon the mains hereinbefore provided for, to order the erection of any intermediate fire-hydrants, the same to be free of charge for water during the time of rental for the hydrants, to be inserted by said grantees at the expense of said city, at the actual cost of such hydrants.

Hydrants.

The hydrants shall be frost proof, double nozzle, of approved pattern, with hose tips fitted to connect with such hose couplings as the town council may adopt.

Valves.

Valves shall be located at such points as will admit of not over three blocks being isolated from balance of system in case of needed repairs or extensions; they shall be of the most approved pattern,

and be capable of withstanding the pressure of three hundred (300) pounds oer square inch on either surface, and be furnished with box cover.

98 Pumping Plant.

The pumping plant including reservoir or stand-pipe from which the mains are to be supplied, shall be of modern approved type and plan, and be capable of throwing five (5) streams through fifty (50) feet of hose and inch ring nozzles simultaneously from five (5) separate hydrants, and under such pressure as will throw streams of water fifty feet (50) high on Fort Sanders, (so called) said five hydrants to be so chosen as to give a just average, two by West Knoxville, two by said grantees, and the fifth by a disinterested party chosen by town council and grantees jointly.

Source of Supply.

The source of supply shall be from Tillery springs, from wells and springs adjacent thereto at or near Sharp's gap, or from spring or wells at or adjacent to property formerly owned by Middlebrook Park Association, or from one or more of said places and in all cases such supply shall be ample for the needs of the corporation and its citizens and inhabitants, and *and* be free from sewerage or other contamination and shall be clear, good and wholesome water, suitable for domestic and manufacturing purposes.

All springs and wells used for said supply, shall be protected from surface-water contamination by suitable stone or brick masonary walls; and from matter falling or being thrown into them by seive or other suitable screens being placed and fixed over or above them.

Sec. IV. In consideration of the public benefit and the protection to property resulting from the construction of said system of water works, the said West Knoxville hereby rent of said grantees
99 fifty (50) double nozzle fire hydrants, to be placed at such points on the mains as may be selected by said town council, for the aforesaid period of twenty (20) years, at an annual rental of $40,00 per hydrant, said fifty (50) and all additions thereto, shall bear an annual rental of $40. forty dollars per hydrant, during the remainder of said period of twenty (20) years. All of which annual rent of said hydrant shall be paid semi-annually on the first day of January and July of each and every year. All hydrants placed upon extension of mains in excess of five and one-quarter (5¼) miles hereinbefore mentioned, shall be placed at the rate of nine per mile of pipe or such extensions.

Water shall be used from such hydrants only for the extinguishment of fires and necessary fire practice, and for the flushing of public sewers and gutters, provided that for said flushing of sewers and gutters not more than one hydrant shall be opened at any one time, and only for a period not to exceed six hours (6) per week,

during the first five years; eight hours per week during the second five years, and ten hours per week for the remainder of said term of twenty years.

Said city shall have the right to flush sewers by hose attached to hydrants on mains, or to tap said mains and insert service mains to connect with the flush tanks of its sewerage system, provided that in so doing, no greater amount of water shall be used than hereinbefore provided for flushing purposes.

SECTION V. Water shall be furnished to the corporation schools and public buildings used for town purposes and two drinking fountains for man and beast and one ornamental fountain to be erected at such point on the lines of mains as the town council may direct if council shall erect ornamental fountain at any point not on mains, as located, then sufficient piping shall be laid from
100 point where fountain is located, sufficient to supply same with water, the same in all pipes, fixtures and connections therefor to be furnished and provided by the town, and no water shall be taken from said fountain for private use; and the remuneration to be paid by the town for said service of water shall be equal during the first five years of the operation of the works to such an amount as may from time to time be levied by town council against said water-works plant for municipal taxation, said amount to be due and payable annually.

And for the remainder of the term that the franchise and contract is to run, said grantees are to be liable for and pay taxes and shall furnish water as provided in this section free of cost for purposes named in this section. In case additional drinking or ornamental fountains are ordered by said city, water shall be furnished for the same at the lowest meter rates. Said grantees shall furnish water free of cost to each of the churches of said city, the same passing through self-closing fixtures, the expense of which together with all pipes and connections and the work of inserting the same to be borne by each of said churches respectively.

SEC. VI. Upon the completion of the construction of the said system of water-works, the grantees shall notify the town council of the fact and thereupon an official test shall be made to show the capacity of the works, and if upon such test it shall be shown that said water-works comply with the requirements as contained in section 3 of this ordinance, then and in that case the said council shall by ordinance or resolution formally accept such system, and thereupon the rental for the hydrants hereinbefore mentioned shall begin.

SEC. VII. Be it further ordained, That within ten days
101 after this ordinance takes effect, said grantees shall file their written acceptance of the ordinance in the office of the recorder, and thereupon the same shall be and become the contract between the said town of West Knoxville and said grantees, as fully as if the provisions of this ordinance were embodied in a formal written contract, made and executed between said grantees and West Knoxville, and said grantees shall also within ten days file with the

recorder a good and solvent bond in the sum of one ($1,000) thousand dollars with good local security, conditioned that if said grantees fail to commence work within the time fixed and prosecute same vigorously (with the exceptions hereinafter named) or shall fail to build the works as agreed that grantees shall and will pay West Knoxville one thousand (1,000) dollars as liquidated damages for failure in either of the contingencies herein named, and agreing and providing that the measure of damages for failure to begin work and prosecute the same vigorously or to build the works as agreed, shall be one ($1,000) — dollars, and that amount shall be paid as liquidated damages, said bond to be approved by the mayor before it is accepted by the recorder.

If works are built and accepted after test, then said bond shall be cancelled, and surrendered. If said bond is not approved by the mayor, the council, may if it so elect, declare the contract at an end and forfeited.

The construction of said system of water-works shall be commenced within thirty days (30) after this ordinance takes effect and be completed by February 1st, 1893, provided, however, that the time during which work is delayed by the act of God, the public enemy, or strikes, shall form no part of said time, but it is expressly provided, that said work shall be completed within eight
102 months from the time this ordinance takes effect in any contingency and without excuse, let, hinderance, or cause of any kind.

SEC. VIII. The said town council shall from time to time enact and enforce ordinances inflicting suitable penalties for the protection of said water works, and all property and things therewith connected, as well as the business thereof from damages, fraud or imposition.

SEC. IX. The said grantees shall make extension of their lines of mains whenever called upon to do so, in any proper season of the year, by said West Knoxville, provided, however, that said extension shall not be less than five hundred and eighty-seven (587) feet or major part thereof.

SEC. 10. After the works are put in operation, West Knoxville may from time to time, have tests made upon the same terms of test required for acceptance of works, and if at any time, the said grantees should fail to produce and maintain the pressure in the mains as hereinbefore provided, the same shall be brought up without delay, unavoidable hinderances excepted, and if unreasonable delay, then the rental for the use of the hydrants shall cease until, the standard pressure is obtained, provided, however, that if such failure shall continue for four (4) consecutive calander months, or if grantees or assigns fail to furnish an ample supply of water as agreed, then all the rights under this ordinance shall at the election of West Knoxville cease and determine, but nothing herein contained shall be so construed as to prevent grantees from temporarily cutting off the water from said system or any portion thereof, for the purpose of making the repairs or extensions to the same, and no liability shall

attach to said grantees for the suspension of the supply of water provided the repairs or extensions are made and the water turned on again without unnecessary delay.

103 It is further provided that if the grantees or their successors fail to supply water for the town or citizens, then no rental shall be paid by either town or citizens during such failure.

SEC. XI. The said grantees shall not charge consumers during the continuance of the franchise granted by this ordinance exceeding the following maximum annual rates, these rates, however, to be subject to ten per cent. discount on all bills made except those where water is metered or used for fire protection, mechanical or manufacturing purposes, if settled within ten days of their date.

The following are the said annual rates, viz:

Banks with self-closing faucit	$6.00
Banks with hose connection extra	8.00
Bakerys daily average each bbl. of flour used, per barrel	4.00
Barber shop, first chair and basin	5.00
Barber shop, each additioual chair	2.00
Baths, private without heating attachments	3.00
Baths, private with heating attachments	4.00
Baths public, first tub	10.00
Baths, each additional tub	6.00
Buiiding purposes, brick per M. laid	.08
Building purposes, stone per cu. yard	.04
Building purposes, plastering per 100 yards	.30
Boarding houses, per room, special	
Halls, theatres and hotels	
Laundry, public, per tub	8.00
Offices, one person with wash basin	5.00
Offices, each additional person	2.00
104 Printing offices, special.	
Residences occupied by one family four rooms or less	6.00
Residences, five rooms or less	7.00
Residences, eight rooms or less	8.00
Residences, if over eight rooms, then fifty cents additional for each room.	
Rest-urants, special.	
Stable, one horse, including carriage washing	2.00
Each additional horse or cow	2.00
Livery, boarding or sale, six horses or less including carriage washing	12.00
Livery, for each additional stall	1.60
Sprinkling lawns, 50 feet frontage per season with like frontage on streets	6.00
Urinals, private, with self closing fixtures	4.00
Urinals, for stores, banks and offices	4.00
Urinals, for rest-urants and saloons, with self-closing fixtures	6.00
Urinals, public, with self-closing fixtures	8.00

Water closets, private	4.00
Water closets, self-closing, stores, banks and offices	5.00
Rest-urants, saloons, etc. self closing	6.00
Public "	8.00

Meter Rates.

100 to 300 gallons, per 1000 gallons	.30
300 to 1000 gallons per 1000 gallons	.25
1000 to 5000 " " " "	.22
5000 to 10000 " " " "	.19
10,000 to 15,000 " " " "	.17
15,000 to 20,000 gallons per 1000 gallons	.15
105 Above 20,000 gallons per 1000 gallons	.13

Fountains.

Five hours per day, for seven months 1/16 inch jet	5.00
1/8 inch jet	8.00
3/16	12.00
5/16	40.00
1/4	45.00

The cost of all pipes and plumbing from the street mains to the point where the water is to be used shall be at the expense of the subscriber taking water, said grantees to have the right to control the cock at the curb line, and to determine the quality and kind of pipe used between the street and main and said curb line. Said grantees may make and enforce all needful rules and regulations in the use and waste of water and charge and collect accordingly in advance therefor, at tariff rates not exceeding those hereinbefore specified, and for all purposes not therein enumerated the rate thereof shall be special rate, not inconsistent with the terms and meaning of this ordinance.

SEC. 12. In the event the said grantees of this franchise should hereafter issue bonds secured by a mortgage or deed of trust upon said water-works, franchises, therewith connected, rentals and rights and property, then so much of the hydrant rental payable under the terms of this ordinance as will discharge the interest upon such bonds as it shall mature from time to time, be paid by the said city to the trustee or trustees of such bonds instead of to the grantees, as herein named, when, and as such hydrant rentals are paid under the terms of this ordinance by said West Knoxville, and all payments so made to such trustee or trustees, shall be made exclusively
106 to pay interest upon such bonds so long as the same shall remain due and unpaid, and any surplus not so payable, and the whole after said bonds shall have been discharged, shall be paid over by said city to said grantees, their successors or assigns, provided, however, that in making payments as aforesaid, to the trustee or trustees as aforesaid, the said town shall be subject to no more

additional trouble, liability or expense that it would be in paying the said rentals direct to said grantees, their successors or assigns; and provided, further, that the said grantees may issue mortgage bonds in sums not to exceed one hundred thousand dollars ($100,000) for the purchase of the necessary property and construction of said water-works of West Knoxville, as hereinbefore described, and also for the Lonsdale-Beaumont and Rosedale Land Companies, and adjacent territory. Said grantees may from time to time, issue bonds as provided for improvements, additions and extensions to said plant in sums not exceeding the actual cost thereof.

And provided further that said town shall incur no liability whatever as to application of said rentals to the payment of such interest, but when such payments are made to said trustee or trustees the same shall be a complete exoneration of said town from such rentals.

SEC. XIII. After the expiration of seven (7) years, after the completion and acceptance of said water-works, or at the end of any period of four years (4) thereafter, during the term of this franchise, or any renewed periods thereof, West Knoxville, or its successors, shall have the right to purchase the said water-works, including the entire plant, out of as well as in West Knoxville, with the privileges, finances and property at a fair valuation ascertained as follows: In case said city, its successors and said grantees or assigns, cannot agree as to price to be paid by said city, the said grantees or
107 assigns for said water works, then said party shall select one competent non-resident hydraulic engineer, who shall be sworn to determine the true value of the works and the two thus appointed shall appoint a third, who shall also be sworn. When said three appraisers shall have been chosen, and before they determine the value aforesaid, the city and said grantees, or assigns, shall each, at their option, have the right to call non-resident experts, not exceeding three in behalf of each party to give testimony under oath before said appraisers as to such value. The said appraisers in determining the value of said works, shall take into account the productive value of all rights, privileges and property and in the event that there is no existing fire-hydrant contract at the date of such appraisement, then the last existing contract shall be included in the estimate. Said appraisement shall be binding upon both parties, as to the value thereof, and the said city of West Knoxville and its successors shall have the right to purchase and become the absolute owner of said works, after such appraised value, the cost and expense of such appraisement to be borne equally by said parties.

And should the city or successor elect not to purchase and own the said works in manner and at the time of such appraisement at either of the periods named, then all the rights and privileges of this ordinance granted to said grantees, or assigns shall continue in full force and effect for the remaining term of this franchise, and the said city shall pay the entire cost of said appraisement, but in no

case shall the amount of such appraisement be less than the actual cost of such works, and all additions thereto up to the time of said appraisement if purchased at the end of the seven years first named, but if purchased at any other period named, then appraise-
108 ment shall be for value and the purchase shall be at and for the appraised or agreed value regardless of cost.

SEC. XIV. Be it further ordained, That this ordinance shall not be taken, construed or held to in any way affect, alter, change or release D. L. McIntyre, George W. Sturtevant, Jr., and their associates and assigns, on their contract, or they or their sureties on the bond given pursuant to an ordinance passed June 29th, 1891, and approved June 30th, 1891, for defaults made, or breeches of contract heretofore made.

SEC. XV. Be it further ordained, That this ordinance take effect from and after its passage, the welfare of the corporation requiring it.

Passed final reading, September 17th, 1892.

Approved, September 17th, 1892.

J. W. YOE, Mayor.

STATE OF TENNESSEE, }
City of Knoxville. }

KNOXVILLE, TENNESSEE.

I, C. C. Nelson, recorder and treasurer and custodian of the books and papers of the city of Knoxville, Tennessee, do hereby certify the foregoing to be a full, true and perfect copy of the ordinance it purports to give as the same appears of record in my office.

Given under my hand and seal of the city of Knoxville, Tennessee July 21st, A. D. 1904.

[SEAL.] C. C. NELSON,
Recorder & Treasurer.

Endorsed: Knoxville Water Co. *vs.* City of Knoxville, *et al.* Exhibit No. 7. Filed Aug. 5, 1904, J. T. Carter, deputy clerk.

109 EXHIBIT No. 8.

At the regular meeting of the mayor & aldermen of the city of Knoxville, Tennessee, held Friday, October 20th, 1899.

Amongst other proceedings of said board the following is a copy of an ordinance passed on third and last reading as the same appears of record on the minutes thereof, pages 192-'3-'4-'5 with acceptance, &c., date above given, and the same is in words, to-wit:

"An ordinance authorizing and giving the consent and approval of the city of Knoxville to the consolidation of the Knoxville Water Company and the Lonsdale-Beaumont Water Company and making changes in certain provisions of the contract between the Lonsdale-Beaumont Water Company and the town council of West Knoxville, known as the contract of September 17th, 1892, and also making changes in certain provisions of the contract between the board of mayor & aldermen of the city of Knoxville and the Knoxville Water Company, dated July 1, 1882.

Be it ordained by the board of mayor & aldermen of the city of Knoxville:

SECTION 1. That the consent and approval of the city of Knoxville is hereby given to the consolidation of the Knoxville Water Company and the Lonsdale-Beaumont Water Company into one corporation under the name of the Knoxville Water Company.

Be it further ordained:

SECTION 2. That such consolidation may be effected by consolidation, purchase, lease or otherwise, under the laws of the State of Tennessee, as may be deemed best by said consolidating companies.

Be it further ordained:

SECTION 3. That said Knoxville Water Company, so succeeding to the rights, franchises and property of the Lonsdale-Beaumont Water Company, and the present Knoxville Water Company may obtain its supply of water to be furnished to its customers, both public and private, from the existing plant and system of the present Knoxville Water Company, or some other plant, system or source equally as good as that now used by the said Knoxville Water Company, and the service thus to be rendered, and the supply so to be furnished shall be deemed and regarded as a satisfactory performance of said consolidated Knoxville Water Company of all obligations both public and private under existing contracts of either or both of said consolidating companies.

Provided always said Knoxville Water Company shall furnish to the people living in what is now the tenth ward of the city of Knoxville (being the territory formerly known as the city of West Knoxville), as well as those that may hereafter live in said territory, clear, good and wholesome water free from all sewerage and other contamination equal in quality to that now being supplied by the Knoxville Water Company to the city of Knoxville, at a maximum rate not exceeding that fixed in the ordinance and contract of September 17th, 1892, being the contract between the Lonsdale-Beaumont Water Company and the town council of West Knoxville, and shall maintain and keep up the pressure provided for in said ordinance and contract. And shall in all other respects maintain and carry out the provisions of said contract, unimpaired except as modified in this ordinance.

And provided, further, that said consolidated Knoxville Water Company, succeeding, as aforesaid, to all the rights, privileges and

franchises of both companies, shall also furnish to the people living in the remaining wards of the city of Knoxville, other than the said tenth ward, or who may hereafter live in said remaining wards or such wards as may be hereafter added to the city of Knox-
111 ville, filtered and wholesome water, or water equal in quality to the filtered water now being furnished by the said Knoxville Water Company, at a maximum rate not exceeding that fixed by the contract between the Knoxville Water Company and the city of Knoxville, dated July 1st, 1882, and the schedule of rates and charges now in force and operation by the Knoxville Water Company.

Be it further ordained:

SECTION 4. That the property and franchises which may be obtained by said consolidated company as *to* the result of said consolidation whether the same be effected by consolidation purchase, lease or otherwise, shall be subject to the right of the city to purchase the same in as full and complete a manner as the property now owned by the Knoxville Water Company is subject thereto, under the terms and provisions of the contract existing between the city of Knoxville, and the Knoxville Water Company, dated July 1st, 1882, as set forth in said contract of July 1st, 1882, is hereby extended and made to cover all the property, franchises, rights and privileges now owned by the Knoxville Water Company, or which may hereafter be acquired by it, or said consolidated company.

Be it further ordained:

SECTION 5. That in order that the consolidation hereinbefore provided for may be effected and to enable the Knoxville Water Company and the Lonsdale-Beaumont Water Company to fund their existing debts and obligations and to provide funds to improve the consolidated plant and make extensions thereto, and in consolidation of the benefit to be derived therefrom by the city of Knoxville, and its inhabitants the Knoxville Water Company shall guarantee or fund the existing debts of said companies and said Knoxville Water Company is hereby released from that provision of its
112 contract with the city of Knoxville, dated July 1, 1882, as aforesaid, limiting its indebtedness to $150,000, and such provision or limit in said contract is hereby abrogated and annulled.

Provided, however, that not more than eight hundred thousand dollars ($800,000) of bonds shall be issued prior to the first day of January 1901, and provided further that no bonds in excess of eight hundred thousand dollars ($800,000) shall be issued except to provide funds for additions to or improvements of the plant and property of said Knoxville Water Company and for any bonds to be so issued, said Knoxville Water Comrany shall file with the recorder of the city of Knoxville a sworn certificate showing the actual cost of such addition or improvements, for which bonds may be issued.

Be it further ordained:

SECTION 6. That within thirty days after this ordinance takes effect, said Lonsdale-Beaumont Water Company and said Knoxville

Water Company shall file their several written acceptances of this ordinance in so far as it alters or changes said contract of September 17th, 1892, and of July 1st, 1882, signed by the president and secretary of said companies in the office of the recorder of the city of Knoxville, and thereupon this ordinance shall be and become a part of each of said contracts as fully as if the provisions of this ordinance were embraced in formal written contract made and executed between the city of Knoxville and the said Lonsdale-Beaumont Water Company and the said Knoxville Water Company.

Be it further ordained:

SECTION 7. That said Lonsdale-Beaumont Water Company and said Knoxville Water Company shall pay for the publication of this ordinance.

113 Be it further ordained:

SECTION 8. That this ordinance shall take effect from and after its passage, the welfare of the city requiring it."

Endorsed: Approved, October 20th, 1899. (Signed) Wm. Rule, mayor.

Thereafter the following papers of acceptance were filed with the recorder, and ordered entered on the minutes of the board and the same are in words, to-wit:

To the board of mayor & aldermen of the city of Knoxville:

The Lonsdale-Beaumont Water Company does hereby accept the ordinance passed on the 20th. day of October, 1899, by the board of mayor & aldermen and approved by the mayor on the 20th. day of October 1899, entitled as follows: An ordinance authorizing and giving consent and approval of the city of Knoxville, to the consolidation of the Knoxville Water Company and the Lonsdale-Beaumont Water Company, and making changes in certain provisions of the contract between the Lonsdale-Beaumont Water Company and the town council of West Knoxville known as the contract of September 17th, 1892, and also making changes in certain provisions of the contract between the board of mayor & aldermen of Knoxville and the Knoxville Water Company, dated July 1st, 1882. This acceptance is intended to be in pursuance of the provisions of section 6 of said ordinance.

In testimony whereof, we Elbert Wheeler, as president and Frank C. Kimball, as secretary of the Lonsdale-Beaumont Water Company, do hereby sign and execute this acceptance on this the 20th. day of October 1899.

(Signed) ELBERT WHEELER,
President of the Lonsdale-Beaumont Water Company.
FRANK C. KIMBALL,
Secretary of the Lonsdale-Beaumont Water Company.

114 The following appears of record on page 196 of the minutes of the board of mayor & aldermen of the city of Knoxville, at said meeting, Friday, October 20th, 1899, in words, to-wit:

"To the board of mayor & aldermen of the city of Knoxville:

The Knoxville Water Company does hereby accept the ordinance passed on the 20th day of October 1899, by the board of mayor & aldermen, and approved by the mayor on the 20th day of October 1899, entitled as follows:

An ordinance authorizing and giving the consent and approval of the city of Knoxville to the consolidation of the Knoxville Water Company and the Lonsdale-Beaumont Water Company, and making changes in certain provisions of the contract between the Lonsdale-Beaumont Water Company and the town council of West Knoxville, known as the contract of September 17, 1892, and also making changes in certain provisions of the contract between the board of mayor & aldermen of Knoxville, and the Knoxville Water Company, dated July 1st, 1882. This acceptance is intended to be in pursuance of the provisions of section 6 of said ordinance.

In testimony whereof, we William Wheeler, as president and John F. Mulhal, as secretary of the Knoxville Water Company, do hereby sign and execute this acceptance, on this the 20th day of October 1899.

(Signed) WILLIAM WHEELER,
President of the Knoxville Water Company.
JOHN F. MULHAL,
Secretary of the Knoxville Water Company.

STATE OF TENNESSEE, }
City of Knoxville. }

I, C. C. Nelson, recorder and treasurer of the city of Knoxville, Tennessee, do hereby certify the foregoing to be full, true and
115 perfect copies of the ordinance it purports to give, and the acceptance of said ordinance which it also gives as the same is now of record in my office in the minutes of the board of mayor & aldermen of said city, bearing date, Friday, October 20th, 1899. This ordinance was published in Tribune and Journal, Oct. 26th, 1899, by order of board as to all ordinances being published.

Given under my hand and seal of said city, at office in Knoxville, Tennessee, July 21st, A. D. 1904.

[SEAL.] C. C. NELSON,
Recorder & Treasurer of the
City of Knoxville, Tennessee.

Endorsed: Knoxville Water Co. *vs.* City of Knoxville, *et al.* Exhibit No. 8. Filed Aug. 5, 1904, J. T. Carter, deputy clerk.

EXHIBIT No. 9.

Chapter 12.

House Bill No. 28.

An act to authorize the city of Knoxville to issue bonds to purchase and acquire the plant and property of the Knoxville Water Company, build extensions thereto, and maintain and operate the same.

Whereas, under and by virtue of a certain contract dated July 1, 1882, executed by the authorities of the city of Knoxville (a municipal corporation) and the Knoxville Water Company (a cor-
116 poration organized under chapter 103 of the Acts of 1877) and an ordinance of said city passed October 20, 1899, and accepted by said Knoxville Water Company on the same day, said city of Knoxville has an option and the right to purchase all the property now owned or hereafter acquired up to the date of the purchase of said Knoxville Water Company, at a valuation to be fixed at an appraisement, if not agreed to, as provided in said contract of July 1, 1882, and carried forward and extended in the ordinance of October 20, 1899; and

Whereas, the city of Knoxville desires to take up said option and purchase the plant and property of said Knoxville Water Company to the end that the same be owned, operated and maintained by said city for the benefit of the people thereof.

Now, therefore, in order that said city may be enabled to purchase and acquire the plant and property of said Knoxville Water Company and build additions thereto that may be deemed necessary.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That the city of Knoxville, the corporate name of which is the mayor and aldermen of the city of Knoxville, be and hereby is authorized to make the purchase of the plant and property of said Knoxville Water Company, and to make necessary extensions thereto, and for that purpose the said city of Knoxville is hereby authorized to issue bonds in such amount, number and denomination, and to run such length of time as may be determined by the mayor and aldermen of said city, at a rate of interest not exceeding 4 per cent., payable semi-annually, for such time as said mayor and aldermen of said city may determine to enable it to acquire the plant and property of the Knoxville Water Company in accordance with
117 the terms and provisions of the aforesaid contract of July 1, 1882, and the aforesaid ordinance-contract of October 20, 1899.

SEC. 2. That authority is hereby conferred upon said corporate authorities of the city of Knoxville to issue such an amount of bonds as may be necessary to purchase and acquire the said plant and

property of the said Knoxville Water Company upon the agreed valuation between the contracting parties, or in default of same, upon a valuation to be ascertained and fixed by appraisers in accordance with the provisions of the aforesaid contract of July 1, 1882, and the ordinance of October 20, 1899, between said city and said water company.

SEC. 3. That in addition to the bonds necessary to enable said city to acquire the plant and property of said water company, said city is hereby authorized to issue additional bonds in an amount not exceeding 10 per cent. of the amount of bonds necessary to purchase said plant and property of said water company to be used in making additions to said plant, including acquisition of such real estate or other property necessary in making such additions.

SEC. 4. The bonds shall be payable in gold coin of the United States of standard weight and fineness, provided, however, that the city may either issue its own bonds in exchange for outstanding bonds of the Knoxville Water Company as part of the purchase price of said plant and property, or the said city may assume, as part of the purchase price, the bonded indebtedness now upon the plant and property of the Knoxville Water Company, or any part thereof, in lieu of the issuance and sale of a proportionate amount of its own bonds under the power herein granted.

118 SEC. 5. Before notice shall be given or an appraisal had in pursuance to the contract of July 1, 1882, and the ordinance of October 20, 1899, or issuance of bonds, an election shall first be called throughout the city of Knoxville under the general laws governing municipal elections in Knox county, and if two-thirds of the qualified voters of said city voting in said election shall vote in favor of the purchase of the plant and property of the Knoxville Water Company and the issuance of the bonds for the purposes of this act, or exercise of other powers herein given, then the mayor and aldermen of the city of Knoxville shall forthwith give notice of the acceptance by the city of the option to purchase said plant, whereupon, unless the valuation of said plant is agreed upon by the contracting parties, an appraisal shall be had of all the property of the Knoxville Water Company, as provided for in the contract of July 1, 1882, and in the ordinance of October 20, 1899, after which bonds sufficient shall be issued as may be necessary under this act for the purchase of said property and plant. The said bonds to be under the management and control of the commissioners to be hereinafter appointed, and to be sold, if sale is necessary, at not less than par; provided, however, that the city may exercise the power herein given to assume the bonds of the Knoxville Water Company to be credited at par upon the appraised value of said property.

SEC. 6. That the commissioners of election shall furnish according to the laws now existing and regulating elections in this State, tickets to be used in said election and upon such tickets shall be printed, first "Bonds;" second, immediately below, "No bonds," and

persons voting for the issuance of bonds and for the purchase
119 of the property and plant of the Knoxville Water Company, and for the extension of same and other provisions of this act, shall mark their tickets with a cross opposite the word Bonds, and those voting against the same shall in like manner mark their tickets opposite the words No bonds.

SEC. 7. That the mayor and aldermen of the city of Knoxville shall have the power of eminent domain to take and appropriate in making extensions to said plant the grounds and other real property in the same manner as are now provided for condemnation in laying out streets, etc., in sub-section 30 of section 18 of the charter of the city of Knoxville.

SEC. 8. That for the purpose of controlling, managing and operating said water plant and for the disposal of the bonds or money realized therefrom, as provided in this act in the event of a favorable election for the issuance of bonds, as hereinbefore provided, there is created a waterworks commission for said city, which shall be composed of three members, all to be reputable citizens and tax-payers of the city without any official connection with the city, and without any connection whatever with the water company. Said commissioners shall be elected by the city council at its next regular session after it has been determined that the city has voted in favor of the issuance of bonds for the purchase of said plant, etc., by the majority herein designated.

The said commissioners so elected shall hold for a period of one, two and three years respectively from the date of their election and qualification, and until their successors are elected and qualified.

The mayor and aldermen of the city of Knoxville shall have the power to fill all vacancies in said waterworks commission at any regular session of said board after which vacancy occurs.

120 Said commissioners shall take an oath of office to faithfully perform their duties before the city recorder, who shall file in his office said oaths and preserve the same, and they shall, likewise give bond in such sums as the mayor and aldermen of the city of Knoxville may prescribe, conditioned for the faithful discharge of their duties, which bond shall likewise be filed and preserved in the office of the recorder of said city.

Said commissioners are forbidden to have or take any interest, direct or indirect, in any contract or transaction relative to the purchase, extension or operation of said plant.

The compensation to be paid said commissioners shall be determined by the mayor and aldermen of the city of Knoxville in such sum as said authorities may deem adequate, the same to be fixed before said commissioners are elected. Said commissioners will elect a chairman and secretary, and also such clerks as may be necessary for the work to be done, and also a treasurer of the commission, whose salary shall be fixed by the mayor and aldermen of the city of Knoxville.

The said commission shall require of such clerks and treasurer

an adequate bond for the faithful discharge of their duties, which bond shall be approved by the board of mayor and aldermen, and shall be filed and preserved in the recorder's office of said city.

The powers and duties of said commissioners shall be full and ample to make all contracts, for the extension of said plant or the operating and maintenance of the same, but all contracts involving an expenditure of more than five thousand ($5000) dollars,
121 shall be reported to the city council, and approved by it before the same shall be final. The said commissioners shall also have the power, subject to the foregoing limitations, of making all needed repairs deemed by them necessary to the proper operation and maintenance of said plant. Upon due notice any commissioner guilty of misconduct or misfeasance in office shall be removed by the mayor and aldermen of the city of Knoxville.

SEC. 9. Be it further enacted, That this act shall take effect from and after its passage, the public welfare requiring it.

Passed January 29, 1903.

L. D. TYSON,
Speaker of the House of Representatives.
ED. T. SEAY,
Speaker of the Senate.

Approved February 2, 1903.

JAMES B. FRAZIER, Governor.

Endorsed: Knoxville Water Co. *vs.* City of Knoxville *et al.* Exhibit No. 9. Filed Aug. 5, 1904, J. T. Carter, deputy clerk.

122 EXHIBIT No. 10.

Chapter 153.

Senate Bill No. 257.

An act to authorize the city of Knoxville to own and operate a system of water works, and to issue bonds for that purpose, and to amend house bill No. 28, being an act entitled "An act to authorize the city of Knoxville to issue bonds to purchase and acquire the plant and property of the Knoxville Water Company, build extensions thereto, and maintain and operate the same," passed January 29, 1903, and approved February 2, 1903, so as to read as follows:

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall be lawful for the mayor and aldermen of the city of Knoxville to acquire, own, and operate a system of waterworks for said city and adjacent territory, either by purchase or construction, and for that purpose it is authorized to issue its interest bearing coupon bonds to an amount not exceeding $750,000 in the manner and under the restrictions hereinafter provided.

SEC. 2. Be it further enacted, That said bonds shall be issued under rules, regulations and restrictions to be provided by ordinance, by the mayor and aldermen of said city, which bonds shall be in the denomination of $1,000 each, and shall bear a rate of interest to be fixed by said ordinance, not exceeding four per cent. per annum, and shall run for a period of not longer than forty years, the interest on the same to be payable semiannually on the first of January and July, respectively, said interest and principal to be paid in
123 gold coin of the present standard and fineness, and which said bonds shall be provided with coupons for each semiannual interest payment, and said bonds shall be known as the "waterworks bonds" of the city of Knoxville, and shall not be sold for less than par. No commission whatever shall be allowed for the sale of said bonds.

SEC. 3. Be it further enacted, That the proceeds of said bonds shall be paid into the city treasury and be there kept and preserved as a separate fund to be used exclusively in the purchase or construction of a system of waterworks for said city and adjacent territory, and in making such alterations, extensions, additions and improvements as may be necessary, and in maintaining the same. Said bonds, and all coupons attached to said bonds, shall at maturity be and remain until fully paid, a lien on said waterworks property, appurtenances, rights, franchises and privileges acquired by the corporate authorities of said municipality. Said lien shall include and extend to all improvements, extensions and additions which the corporate authorities of said municipality may make, and shall be in addition to the corporate liability for the payment of said bonds. Said bonds and coupons attached thereto, shall be exempt from municipal taxation.

SEC. 4. Be it further enacted, That there is hereby created for said city of Knoxville, a waterworks commission, to be composed of five citizens and freeholders of said city, who shall be elected by the city council of said city, as herein provided. One member shall be elected for one year, one for two years, one for three years, one for four years and a fifth for five years, who shall hold their office for the time for which they shall be elected and until their successors shall be elected and qualified; which successors shall each be
124 elected at the conclusion of the several terms aforesaid for the term of five years thereafter; provided, that election to fill vacancies in said commission shall only be for the unexpired term in which the vacancy occurs. Said commissioners shall not be related to the mayor or any member of the city council, or any department official of said city within the fourth degree, either by affinity -- consanguinity. The first board of commissioners shall be elected not earlier than sixty days after the passage of this act, which election and all subsequent elections, including elections to fill vacancies, shall be upon thirty days' public notice, and at a regular meeting of said city council.

SEC. 5. Be it further enacted, That before entering upon their

duties said commissioners shall each file with the city recorder a bond with solvent sureties in the penalty of one thousand dollars, payable to the State of Tennessee for the use of the city of Knoxville, conditioned that said commissioner shall honestly and faithfully perform all the duties devolving upon him as such commissioner, which bond shall be approved by the mayor and aldermen of said city, and said commissioners shall before entering upon their duties, take and subscribe to the following oath:

"I, —— ——, do solemnly swear that, as a member of the waterworks commission of the city of Knoxville, I will honestly and faithfully perform all the duties devolving upon me as such commissioner, and that I am not related to any of the parties forbidden by law within the prohibited degree, and that I am not, and will not become during my term of office, interested in any contracts
125 relating to the construction or operation of said waterworks, as prohibited by law, so help me God."

SEC. 6. Be it further enacted, That said commissioners are hereby prohibited from having any interest, direct or indirect, in any contract in anywise relating to the construction, purchase and operation of said waterworks, and are also prohibited from awarding contracts for the construction or operation, or for any material for use in the construction, extension and operation of said water plant to any person or persons related to any of the members of said commission within the fourth degree, either by affinity or consanguinity, or to any member of the city council, or to any department official of said city, or in which any such person, member or department official, or any assistant, clerk or deputy under them, has any direct or indirect interest.

SEC. 7. Be it further enacted, That the entire work of supervision of the purchase or construction and operation and maintenance of said system of waterworks shall be vested in said board of commissioners as above provided within the limitations hereinafter provided.

SEC. 8. Be it further enacted, That said commissioners are authorized and directed to obtain from the Knoxville Water Company a written proposition for the sale of its plant, franchises etc., to the city of Knoxville, giving the price and terms of payment, together with the opinion of competent, disinterested experts as to the cost and present value of said plant; said commission is also authorized and empowered to secure plans, specifications and estimates of the cost of the construction of a new system of waterworks, and to report all matters called for in this section to said city council for its consideration, and to accompany said report with its recommendations in the premises, which recommendations shall be accompanied
126 with all facts, testimony and opinions upon which the same are based. Provided, that said commission shall not close any contract for the purchase or construction of waterworks until it has been duly authorized to do so by said city council, after the proposition shall have been ratified by a vote of the people as herein

provided; and provided, further, said commission shall not incur any expense in any of said matters until authorized to do so by said city council, and until there has been appropriated out of the city treasury and placed to the credit, and at the disposal of said commission, a sufficient amount of money to cover such expense.

SEC. 9. Be it further enacted, That said commission shall organize by electing one of their number as chairman, and by electing a secretary and treasurer, who need not be a member of said board of commissioners, but who, before entering upon his duties, shall execute bond in a penalty to be fixed by the board of mayor and aldermen, and with good and sufficient sureties to be likewise approved by said board. Said waterworks commissioners shall have regular meetings and may have special meetings under rules and regulations adopted by themselves. They shall keep a true and faithful record of all their actions and proceedings, and of the waterworks plant purchased or constructed by them, and of all extensions, alterations and improvements made by them. A copy of said record on any subject, certified by said chairman and secretary, shall be evidence in the courts of this State. They shall be authorized to make contracts, employ clerks, engineers, firemen, superintendents, inspectors, water meter readers, plumbers, laborers and other persons, and purchase materials such as may be necessary in the construction or operation of said waterworks plant. They shall fix the compensation of all employés, except that of the sec-
127 retary and treasurer, whose salary or compensation shall be fixed by the board of mayor and aldermen. Said secretary and treasurer when elected, shall not be related to any member of said waterworks commission, or to any department official of said city within the fourth degree. They are authorized to make and enforce reasonable rules and regulations and to fix water rates, tolls, or the price for the use of water, and they may for said purposes, enter upon premises where water is used or desired for purposes of inspection, repairs or other work in introducing or regulating the use of water. They shall have full power to collect and enforce collections of all moneys due for the use of water or arising out of the operation of said plant. They shall also have power to grant the use of water free of charge to persons who are objects of charity and to charitable institutions. But the rules and regulations and water rates made by said commissioners shall be subject to ratification by ordinance by the board of mayor and aldermen.

SEC. 10. Be it further enacted, That no contract made by said waterworks commissioners in the construction, alteration or extension of said waterworks, involving more than one thousand dollars, shall be binding upon the city, until submitted to the board of mayor and aldermen and approved by them.

SEC. 11. Be it further enacted, That said waterworks commissioners shall submit to the board of mayor and aldermen at their last regular meeting in January of each year, a full detailed report of the work, income and expenditures for the preceding

year, showing sources of income, items of expense, names of all salaried employés, improvements, extensions and alterations made and such other matters as they may deem material and as the board of mayor and aldermen may call for. And their
128 report and books shall be subject to examination and correction by the board of mayor and aldermen. Said report shall also contain an estimate of the costs, expenses, improvements, extensions and alterations necessary for the succeeding year.

SEC. 12. Be it further enacted, That the board of mayor and aldermen of the city of Knoxville shall have and are hereby given and granted power and authority to determine by ordinance whether or not the members of the waterworks commission shall be compensated for services rendered or shall render same without compensation, and if compensation is determined to be allowed them, then the amount of such compensation and manner and time of its payment shall be fixed by ordinance.

SEC. 13. Be it further enacted, That in the event it shall be determined to purchase or construct, equip and maintain a system of waterworks by the city, then for the purpose of securing sites for pumping stations and other necessary purposes, including the laying of mains and water pipes, and sites for reservoirs and filtering galleries, extensions, improvements and alterations, the city shall have and is given the right of condemnation of grounds within and without its corporate limits, as already given in subsection 30 of section 18 of its charter, as well as by proper proceeding in the circuit court for Knox county, as provided by law.

SEC. 14. Be it further enacted, That any member of said board of waterworks commissioners shall be subject to removal by the board of mayor and aldermen for incompetency or official misconduct, upon specific charges in writing and after due notice to the members against whom charges are made, and after trial, or opportunity of trial, before the board of mayor and aldermen. But two-thirds of said board of mayor and aldermen shall vote for said removal before the same can be made.

129 SEC. 15. Be it further enacted, That after said commissioners shall have made their report to the city council as provided in section 8 of this act, said city council shall call an election to be held in the said city of Knoxville by the regularly constituted authorities, after thirty (30) days' advertisement in two city papers, at which all persons legally qualified to vote for mayor and aldermen of said city may vote for the purpose of ascertaining the will of the people upon the following question:

First. Whether or not the city shall be authorized to issue bonds as provided in section 1 of this act, and

Second. To determine whether the city shall purchase the plant of the Knoxville Water Company, or construct a new water system. The election commissioners shall cause to be prepared ballots to be used and voted at said elections on which there will be printed the following:

"Vote for One."

"For Waterworks Bonds."

"Against Waterworks Bonds."

"Vote for One."

"For Construction of Waterworks."

"For Purchase of Waterworks."

At said election those who favor the issuance of bonds shall place a cross (X) mark opposite the words "For waterworks bonds," and those who oppose the issuance of bonds shall place a cross (X) mark opposite the words "Against waterworks bonds," and those who favor the construction of waterworks shall place a cross (X) mark opposite the words "For construction of waterworks," and those favoring the purchase of the Knoxville Water Company's plant shall place a cross (X) mark opposite the words "For purchase of waterworks."

130 Provided, that if said waterworks commissioners are unable to obtain from the Knoxville Water Company a written proposition for the same of its plant, franchise, etc., to the city of Knoxville, giving the price and terms of payment, "For waterworks bonds," "Against waterworks bonds," shall be issued for the construction of waterworks and the tickets shall contain only the words "Vote for one," "For waterworks bonds," "Against waterworks bonds," and those who favor the construction of waterworks by the city shall place a cross (X) mark opposite the words "For waterworks bonds," and those who oppose the construction of waterworks by the city, place a cross (X) mark opposite the words "Against waterworks bonds." Said election shall be held under existing laws and the return shall be duly certified to the board of mayor and aldermen of said city; provided, there shall also be returned to said board of mayor and aldermen all the ballots voted at said election, together with one set of poll books and one set of tally sheets. The remaining poll books and tally sheets shall be filed in the office of said commissioners of election, there to be held subject to the inspection of any citizen of said city. Provided, that the election authorized by this act may be called and held by the election commissioners of the county under the general election laws and held at any time within two years after the passage of this act.

Provided further, that after one election has been held under this act, one or more subsequent elections may be held under this act, but no such election shall be held until the expiration of at least twenty-four months after a previous election.

Sec. 16. Be it further enacted, That it shall be the duty of said city council, when it shall be convinced that two-thirds of all
131 those voting on the question of the issuance of bonds have voted in favor thereof, to declare the result by ordinance, and

in that event and no other, to cause said bonds to be issued as provided herein, and cause the same to be converted into cash under such rules and restrictions as it shall deem necessary to provide by ordinance. Provided, that said bonds shall not be issued until after a contract for the construction or purchase of said water-works shall have been lawfully made and concluded.

SEC. 17. Be it further enacted, That said city council shall also canvass and by ordinance declare the result of said election on the question of purchase or construction of a system of waterworks, and shall cause to be carried into effect the will of the people, as expressed at said election. Provided, that if the said Knoxville Water Company submit a written proposition as shown in section 8 of this act, a majority of those voting on said proposition for purchase or for construction in favor of either proposition, shall be sufficient and shall decide the question.

SEC. 18. Be it further enacted, That the net annual income and revenues derived from the operation of the waterworks system, after payment of operating expenses, extensions and improvements, or as much thereof as shall be necessary for that purpose, shall be set apart and applied first to the payments of the interest coupons of said waterworks bonds, as such interest coupons shall mature.

SEC. 19. Be it further enacted, That all laws and parts of laws in conflict with this act are hereby repealed, and that this act take effect from and after its passage, the public welfare requiring it.

Passed March 31, 1903.

ED. T. SEAY,
Speaker of the Senate.
L. D. TYSON,
Speaker of the House of Representatives.

Approved April 3, 1903.

JAMES B. FRAZIER, Governor.

132 Endorsed: Knoxville Water Co. *vs.* City of Knoxville, *et al.* Exhibit No. 10. Filed Aug. 5, 1904. J. T. Carter, deputy clerk.

Motion for a Preliminary Injunction.

In the United States Circuit Court for the Northern Division of the Eastern District of Tennessee.

KNOXVILLE WATER COMPANY, Complainant,
vs.
MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE ET AL. } No. —.

Motion for Preliminary Injunction.

Now comes the complainant in the above entitled cause, The Knoxville Water Company, by Shields, Cates & Mountcastle, solicitors of

complainant, and moves this honorable court to grant a writ of injunction against defendants Mayor and Aldermen of the City of Knoxville and The Water Works Commission of the City of Knoxville, and each of them, or defendant's attorneys, clerks, servants and employees, pending this suit and until the further orders of this court, upon the prayer of the bill in said cause filed.

SHIELDS, CATES & MOUNTCASTLE,
Solicitors for Compl't.

Endorsed: Knoxville Water Co. *vs.* Mayor & Aldermen of the City of Knoxville, *et al.* Motion for preliminary injunction. Filed Aug. 5, 1904, J. T. Carter, deputy clerk.

133 Restraining Order.

In the United States Circuit Court for the Northern Division of the Eastern District of Tennessee.

KNOXVILLE WATER COMPANY, Complainant,
vs.
MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE ET AL. } No. —.

Whereas, in the above cause, a motion for the issuance of a preliminary writ of injunction has been duly filed, the hearing thereof being fixed for the 19th day of September, 1904, at Knoxville. If defendants ask to have the motion for injunction heard on an earlier day it will be done if practicable, and it having been made to appear that there is danger of irreparable injury being caused to complainant, before the hearing of said application for a writ of injunction, unless the said defendants, Mayor & Aldermen of the City of Knoxville, and The Water Works Commission of the City of Knoxville are, pending such hearing, restrained as herein set forth, therefore complainant's application for such restraining order is granted:

Now therefore, take notice that you, Mayor & Aldermen of the City of Knoxville and W. L. Russell, F. J. Callan, E. G. Oates, J. Allen Smith, J. Y. Johnston, constituting The Water Works Commission of the City of Knoxville, defendants herein, your agents, servants and attorneys, and each of you are hereby specially restrained and enjoined from entering into any contract for the building and construction of a separate, independent and competing water plant, that is a water plant which shall be used in competition to the plant
of complainant Knoxville Water Company, and from issuing
134 any bonds, and especially those bonds claimed to be authorized by and under chapter 153 of the Acts of 1903, and the election held in the city of Knoxville on the 9th day of July 1904, for the purpose of building and constructing a separate, independent and competing water plant, until the hearing of said application for writ of injunction and until the further order of the court in the premises.

This sixth of August 1904.

(Signed) CLARK, Judge.

Endorsed: No. 1382. Restraining order. Knoxville Water Co. *vs.* M. & A. of the City of Knoxville, *et al.* Filed Aug. 8, 1904, J. T. Carter, deputy clerk.

Return.—Received at Knoxville Aug. 10, 1904. Executed by serving W. H. Gass with copy of writ, also copy of bill, and reading the within writ to each of the within named water works commission of the city of Knoxville, Tenn. on Aug. 10th & 11th. 1904, in Knox county, Tenn.

Marshal's cost	$12.00
Expense	30
	$12.30

C. W. McCALL, D. M.

Chancery Subpœna.

UNITED STATES OF AMERICA, Eastern District of Tennessee, } ss:

The United States of America to the Mayor & Aldermen of the City of Knoxville, a municipal corporation, and W. L. Russell, F. J. Callan, E. G. Oates, J. Allen Smith; and J. Y. Johnston, con-
135 stituting the water works commission of the city of Knoxville, Greeting:

We command you, and every one of you, to appear before our judge of our circuit court of the United States of America, for the eastern district of Tennessee, at Knoxville, on the second Monday of September next, that being the rule day to which this writ of subpœna is returnable to answer to the bill of complaint of the Knoxville Water Company, a corporation, this day filed in the clerk's office of said court, in the city of Knoxville, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the eastern district, to execute:

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Knoxville, aforesaid, this 8th. day of August in the year of our Lord one thousand nine hundred and four, and of our Independence the 129th.

HENRY O. EWING, Clerk,
By J. T. CARTER,
Deputy Clerk.

MEMORANDUM.—The above named defendants are hereby notified that unless they enter their appearance in the clerk's office of said

court at Knoxville aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

[SEAL.] HENRY O. EWING, Clerk,
By J. T. CARTER,
Deputy Clerk.

Endorsed: No. 1382. Circuit court, United States. eastern district of Tennessee. Knoxville Water Co. *vs.* Mayor & Aldermen of the City of Knoxville, *et al.* Chancery subpœna. Returnable to rule day 12th. day in September, A. D. 1904, Henry O. Ewing,
136 clerk. Issued Aug. 8th. A. D. 1904, Henry O. Ewing, clerk. Shields, Cates & Mountcastle, complainant's solicitors. Filed Aug. 12th. 1904, J. T. Carter, deputy clerk.

Return.—Received this writ Aug. 10th at Knoxville, Tenn. Executed same as commanded by serving W. H. Gass, mayor, with copy, and reading the within writ of subpœna to the within named water works commission of the city of Knoxville, on Aug. 10th & 11th, 1904, in Knoxville, Tenn. Marshal's cost $12.00, C. W. McCall, D. M.

Be it remembered that at a circuit court of the United States, began and held for the northern division of the eastern district of Tennessee, at the Federal court rooms in the city of Knoxville, within said district and the sixth circuit on the second Monday, it being the 12th day of September, A. D. 1904, the following proceedings were had, to-wit:

There being no judge of said court present, the court was regularly opened by Richard W. Austin, United States marshal for the eastern district of Tennessee, and thereupon the court was adjourned by said marshal until to-morrow morning at 9 o'clock.

TUESDAY, September 20th, 1904.

Court met pursuant to adjournment.

Present and presiding: The Honorable C. D. Clark, judge &c.

KNOXVILLE WATER COMPANY
vs.
MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE. } No. 1382.

137 In this cause on application of the plaintiff, Knoxville Water Company, leave is hereby granted to amend its bill upon the face thereof by adding immediately at the close of the 15th paragraph, the following:

"Your orator further shows that by section 18 of article 2 of the constitution of Tennessee, it is, among other things, provided that, "No bill shall become a law until it shall have been read and passed on three different days in each house, and shall have received on

its final passage in each house, the assent of a majority of all the members to which that house shall be entitled under this constitution, and *shall have been signed by the respective speakers in open session, the fact of such signing to be noted on the journal,*" etc., and your orator charges that said act of the General Assembly of the State of Tennessee, known as chapter 153 of the Acts of 1903, as aforesaid, was not signed by the speaker of the senate in open session, nor was the fact of such signing noted upon the journals of the senate and is not now so noted, so that your orator charges that said act not having been passed in conformity with the aforesaid mandatory requirements of the constitution of Tennessee, and not having received the signature of the speaker of the senate in open session, which fact was not and is not noted upon the journals of the senate, is therefore void and in contravention of the constitution of Tennessee.

138 Demurrer.

In the Circuit Court of the United States at Knoxville, Tennessee.

KNOXVILLE WATER COMPANY, Complainant,
vs.
MAYOR & ALDERMEN OF CITY OF KNOXVILLE and Others, Defendants. } # —. In Equity.

The joint and several demurrer of the Mayor & Aldermen of the City of Knoxville and W. L. Russell, F. J. Callan, E. G. Oates, J. Allen Smith, and J. Y. Johnson, constituting the water works commission of the city of Knoxville, to the bill filed against them in the above entitled cause.

These demurrants by protestation, not confessing or acknowledging all or any of the matters or things in the bill to be true in manner or form, as therein set forth and alleged, do demur thereto, and for grounds of demurrer show:

First.

Because the bill, on its face, when taken in connection with its exhibits thereto and made part thereof, shows that this court is without jurisdiction in the premises.

Second.

Because the bill fails to aver or show anything therein, standing alone or taken in connection with the exhibits filed therewith and made part thereof, which shows that defendants have in any way impaired the obligation of the complainant's contract rights
139 in contravention of section 10, article 1, of the United States Constitution, or have or will in any way deprive complainant

of its property and franchises without due process of law, or have or will deprive it of the equal protection of the law, in contravention of the 14th amendment of the Constitution of the United States.

Third.

Because the bill fails to allege any fact or facts which show that demurrants have, or intend to do or commit, any act which will impair the obligation of any contract between the demurrant City and the complainant Knoxville Water Company, if there be any contract between them.

J. W. CULTON,
JEROME TEMPLETON,
R. H. SANSOM,
JNO. W. GREEN,
Solicitors for Demurrants.

STATE OF TENNESSEE, }
Knox County. }

W. H. Gass being first duly sworn makes solemn oath and says: That he is the mayor of the defendant municipal corporation, Mayor and Aldermen of the City of Knoxville, and that the foregoing demurrer is not interposed for delay.

W. H. GASS.

Sworn to and subscribed before me this the 20 day of Sept. 1904.
[SEAL.] J. T. CARTER, Dep. Clerk.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

J. W. CULTON,
JEROME TEMPLETON,
R. H. SANSOM,
JNO. W. GREEN,
Att'ys for Def'ts.

140 Endorsed: No. 1382. Knoxville Water Co. *vs.* Mayor & Aldermen of Knoxville *et al.* Demurrer. Filed Sept. 20, 1904. J. T. Carter, deputy clerk.

THURSDAY, September 29th, 1904.

Court met pursuant to adjournment,
Present and presiding, the Honorable C. D. Clark, judge &c.

KNOXVILLE WATER COMPANY
vs.
MAYOR & ALDERMEN OF CITY OF KNOXVILLE ET AL. } No. 1382.

In this cause upon application of complainant, Knoxville Water Company, it is ordered that the original bill be and the same is

hereby amended so as to strike out that portion thereof beginning with the word "with" in the third line of the fourth page and ending with the words "some other way," being the first three words in the sixth line on said fourth page, and substituting in lieu thereof the following, "and its inhabitants with a supply of water for fire protection, public, sanitary and domestic purposes," and it is ordered that said amendment be made upon the face of said bill.

141 In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

KNOXVILLE WATER COMPANY
vs.
MAYOR & ALDERMEN OF THE City of Knoxville *et al.*

No. 1382. Heard on Demurrer and on Application for Injunction.

There can be no doubt in regard to the jurisdiction of this court over the case as involving a Federal question, unless it can be affirmed that the averments of the bill as to the existence of this constitutional or Federal question plainly appear not to be real and substantial, but without color of merit.

Newburyport Water Co. *v.* Newburyport, 193 U. S. 561.

It requires, however, no very extended or close study of the allegations of the bill and the contract on which the claims made in the bill are grounded to perceive that the constitutional question is one of substantial and serious import, in view of the well considered cases, both State and Federal.

When the Federal question appears to be substantial, or to possess color of merit, the jurisdiction of this court is undoubted and does not at all depend on whether or not the Federal question shall be decided against the contention of the plaintiff on the merits.

Swafford *v.* Templeton, 185 U. S. 487.
City Ry. Co. *v.* Citizens' R. R. Co., 166 U. S. 557.
Penn Mutual Life Ins. Co. *v.* Austin, 168 U. S. 695.
Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S. 65.
New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 79.

142 City Ry. Co. *v.* Citizens' R. R. Co., 166 U. S. 557.

See also cases cited in N. C. & St. L. R. R. Co. *v.* Taylor, 86 F. R. 168.

In the case of Walla Walla *v.* Walla Walla Water Co., 172 U. S., 1, cited and much relied on by both sides, the Supreme Court of the United States, speaking by Mr. Justice Brown, in relation to the point of jurisdiction, said:—

"The argument which attacks the jurisdiction of the court upon the ground that the complaint is devoid of facts showing any matter which vests jurisdiction, goes rather to the sufficiency of the plead-

ing than to the jurisdiction of the court. Even if this objection had been sustained, the difficulty could have been easily obviated by amendment. We think, however, that it sufficiently appears that, if the city were allowed to erect and maintain competing water works, the value of those of the plaintiff company would be materially impaired, if not practically destroyed."

See also Iron Mountain R. Co. *v.* City of Memphis, 37 C. C. A., 410, in which the opinion of the court was given by Judge Taft.

The jurisdiction of this court is then quite clear, I think, and I pass at once to the merits of the contention.

By way of preliminary observation it may be remarked that the erection of water works by a municipal corporation in this State for the purpose of supplying itself and the inhabitants of the city within the corporate limits with water is one of the ordinary powers of a municipal corporation, and needs no enabling act to authorize the exercise of such a power.

City of Memphis *v.* The Memphis Water Co., 5 Heisk., 495.
City of Cleveland *v.* United States, 49 C. C. A., 383.

And such seems to be the rule in Louisiana.

Lake Charles Ice, Light & Waterworks Co. *v.* Lake Charles, 106 La. 65; S. C. 30, So. 289, and in Wisconsin also; Ellenwood, *et al. v.* The City of Reedsburg, *et al.* 91 Wis. 131.

In other jurisdictions such power is not regarded as one of the ordinary or implied powers of a city.

143 1 Farnham on Waters and Water Rights, sec. 146–150, and cases cited.

The proposition that the erection of water works to supply a city and its inhabitants with water is one of the ordinary powers of a municipal corporation was not in the form of stating the proposition in City of Memphis *v.* The Memphis Water Co., 5 Heisk., 495, extended beyond the erection and operation of water works by the city itself, and I do not understand that the plaintiff's contention is that under this ordinary or implied power the city would be authorized to contract with public service companies or corporations for a supply of water by the erection and operation on the streets of the city of a water works system, in the absence of express legislative authority, and I do not understand that it is insisted that this ordinary power of the city to erect and operate a water works system for the purpose of supplying the inhabitants of the city with water, as declared in The City of Memphis *v.* The Memphis Water Co., would enable the city, by contract or ordinance, to grant the right and privilege of furnishing a water supply in favor of third persons or public service corporations, or to make such right and privilege exclusive, in the absence of express legislative authority.

In this view it does not seem necessary to make further reference to the case of City of Memphis *v.* The Memphis Water Co., for the purpose of the particular question here presented for determination.

In view of the general proposition that a municipal corporation can exercise only such powers as are expressly granted in its charter, or a general law, and those necessarily implied as incident to the power expressly granted, it is plainly evident that the construction of a water plant by the issuance of bonds, and the execu-
144 tion in detail of the scheme under which the defendant city is now acting, can only be done by an enabling act of the legislature, and the city must be regarded as exercising the powers conferred upon it by the enabling act of 1903, and not otherwise.

As the statute under which the city is proceeding is directly attacked in the bill as not constitutionally passed, and therefore invalid, it would seem to be in logical order to dispose of this question first, for if this objection is well founded it would fully dispose of the case as now presented, and the discussion or determination of other points which arise would not now be necessary.

The act of 1903 having been regularly and duly printed and published as a statute of the State, the presumption is that it was duly and constitutionally passed, and the burden of showing the contrary is on the party attacking the legislation in this regard.

Upon examination of the journals of the senate and house the bill which resulted in the act of 1903 appears to have been regularly passed in all respects, except a single defect which appears on the Senate Journal at pages 550 and 551. The number of this bill (257) is exactly the same on both pages of the Senate Journal, but this bill, together with a series of others passed at the same time, were referred to on Senate Journal, page 550, as *senate bills*, while in the second entry of the same series of bills, page 551, they are designated in the announcement of the speaker's signature as *house bills*, while they were in fact senate bills, and should have been so noted and described.

But as the number of the bill, taken in connection with the series of other senate bills found on these pages, identifies it as being the same bill which is referred to as senate bill No. 257 on page 550, I think the discrepancy or defect is manifestly a mere clerical error
145 in noting and describing the bill as *house bill*, when it should have been *senate bill*, and that the bill is sufficiently identified by number, and the connection in which it appears in relation to other bills on the two pages referred to, and by examinations of the journals elsewhere.

This being so it appears that the bill was constitutionally and validly passed.

It is the duty of the courts to uphold the legislation as constitutionally and validly passed by disregarding a mere clerical mistake or omission, when sufficient evidence is found on the face of the journal to show that the defect is one of mere clerical mistake or omission.

This conclusion that the act of 1903 was constitutionally passed makes it necessary to dispose of the remaining issues in the case.

In the first place if the city in the contract which it made with

the complainant company had expressly contracted against the erection and operation of water works on its own account during the period of the 30 year limit of this contract; or, stated differently, if the city had stipulated that the use of its streets for water works purposes should be exclusively in the complainant company for the period of 30 years, such a contract on its part would not have constituted a perpetuity or monopoly, within the meaning of the constitution of this State under the cases already cited of City of Memphis *v.* The Memphis Water Co., City of Cleveland *v.* United States, and also the case of Citizens' Street Railway *v.* Detroit Railway, 171 U. S. 48.

This view, however, would have left the difficulty that the city of Knoxville is without the power by contract in form, or by grant in an ordinance, to vest in the complainant company the ex-
146 clusive privilege or franchise of using the streets and alleys of the city for the construction and operation of a water works plant. It could only have done so under an express grant from the legislature of the power to do so, and it could not exercise such a power by implication.

Westerly Water Works *v.* Westerly, 80 F. R. 611.

Kirkwood *v.* Meramec Highlands Co., 94 Mo. App. 637; S. C. 68 S. W. Rep. 761.

Syracuse Water Co. *v.* Syracuse, 116 N. Y. 167.

McQuillin on Municipal Ordinances, sec. 190–191, and cases collated.

3 Cook on Corporations, sec. 931, p. 2761, and cases.

Illinois Trust & Sav. Bank *v.* Arkansas City Water Co., 67 F. R. 196.

I conclude that if the city of Knoxville had expressly inserted in the contract a stipulation that it would not itself during the contract with the complainant company erect and operate a water works plant, and further that it would not contract with or grant the right to others to do so, and had attempted in that way expressly to make the rights granted to the complainant company exclusive, that such a particular stipulation in the contract would have been invalid for want of legislative authority to do so, and not because there would have existed constitutional objection to such a provision.

This proposition is one in regard to which the cases are divided, but it has the support of the weight of authority, and the more recent cases in which the point has been in judgment make no distinction in this respect, in regard to whether the city is acting by contract in the ordinary form, or by ordinance in the form of a grant.

The weight of authority is that in such a matter the city is
147 exercising its governmental or legislative power as contra-distinguished from its proprietary or administrative power, and in view of all that is said in the case of Walla Walla Water Co. *v.* Walla Walla, 172 U. S. 1, it is doubtful if that distinction is

material or important in a case like the one at bar, and the questions here involved.

The rule which denies to a municipal corporation the power, by contract or by ordinance, to confer upon public service corporations the exclusive use of the streets and alleys of the city, even for a limited number of years, in the absence of express legislative authority to do so, is a rule of strict construction in regard to the powers of such corporations, and the question of power depends upon the subject matter of the contract or ordinance, and not upon the mode in which the *exclusive privilege* is conferred as being in the form of a contract or ordinance.

The rule of strict construction is applicable when the municipal corporation is dealing with the uses of an easements in the streets and alleys which it holds in trust for the public, regardless of whether it is dealing with the subject by contract or by a franchise ordinance, when it may enact such ordinance under deligated authority from the legislature.

It is very true in this State that a public service corporation like the complainant must and does obtain its corporate franchises from the State, and that it deals by contract with the municipal corporation in obtaining the permission of such corporation to the use and occupation of the streets, with the terms and conditions upon which it may do so.

But, as already stated, I do not conceive that it makes any difference in the rule of strict construction when the contract relates to rights and privileges in the use of the streets.

148 I conclude that when the legislature of the State has not in the franchise grant made the use and occupation of the streets exclusive for a term of years, nor expressly authorized the municipal corporation to do so, that the latter is without authority to do so, and that an express provision to that effect inserted in its contract would be invalid.

In the ordinary case of a contract between individuals like the one here between the city and complainant I might be strongly disposed to hold that the city had contracted by necessary implication not to erect and maintain water works on its own account during the running of the contract with complainant; that is for the 30 year period. No other reasonable or just interpretation could be put upon this contract, in the light of the circumstances under which it was made.

The city had at that time been in a proper way considering the question of building a water works plant of its own, and had made certain preparations for that purpose by securing suitable parcels of land, or real estate.

In its contract with this complainant the complainant was required to take and pay for that property, and it was accordingly conveyed to it, which obviously could signify nothing else than an intention on the part of the city at that time to abandon its own

plan of erecting or maintaining water works, in view of the contract made with the complainant.

To induce the complainant to expend its money and engage in the enterprise of furnishing the city and its inhabitants needed water, the city undertook expressly to protect the complainant in the enjoyment of its rights by a term or provision in the contract that it would not grant a similar right to any other person or corporation during the life of the contract. This desire to induce the investment of the capital and the purchase from the city of the real estate previously secured for the purpose of the plant, would
149 obviously fail to afford protection if the city should itself, during the same period, erect and operate a water works plant of its own, and in that way come in direct competition with the complainant.

It is hardly to be doubted that it was understood by both parties that the city would not itself engage in such an enterprise and in that way enter into direct competition with the complainant company during the contract. Such a view would, in effect, be no more than to require on the part of the city that it would act in good faith in relation to the contract with the complainant. Or, to state the proposition in the very language of the Supreme Court of the United States in Walla Walla Water Co. *v.* Walla Walla, 172 U. S. 1:

"As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith."

"An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years."

In Tyrone Gas & Water Co. *v.* Tyrone, 195 Penn. 566, it was declared by the court that competition, especially on the part of a municipality, is a virtual confiscation of property.

As between two individuals such an interpretation of this contract would be justly and fairly permissible.

While this is so, and while such a construction might be the result of a contract between individuals, there is a rule well settled by the cases, and growing largely out of public policy and the danger of abuse, which, in the case of a municipal corporation and its contracts in the interest of the public with private corporations or individuals, denies such an interpretation by implication as would cut off the city's right to operate and maintain a water works plant
150 of its own in the interest of the city and its inhabitants, if it should choose to do so.

If the city of Knoxville was without legislative authority or power by contract to make easements and privileges in the streets and alleys of the city exclusive by express stipulation or grant, it is hardly necessary to say that such an exclusive privilege or right cannot

arise by implication, for it may be stated as a general rule that the law never implies a contract or a term or provision in a contract where none could have been expressly entered into by the parties. 20 A. & E. Encycl. of L., 2 ed., p. 1158, and cases in note.

The rule of strict construction in regard to the powers of a municipal corporation, and which denies to such corporation the power by implication, by contract, or otherwise, to confer on third persons or public service corporations exclusive easements and rights in the uses of the streets has been declared in many cases, but it is not deemed necessary to refer to any considerable number of such cases. The general rule was declared in this State in Memphis *v.* Memphis Water Company, 8 Baxter, 589. In Railroad Co. *v.* Memphis, 3 Shannon's Tenn. Cases, 193, it was decided by the supreme court of this State that a municipal corporation is without power, in the absence of express legislative sanction or authority, to enter into a binding contract with individuals or private associations for the exclusive use and operation of street railways on and over the streets of the city. Among decisions of the Supreme Court of the United States the following may be referred to upon the subject:—

Joplin *v.* Light Co., 191 U. S. 150.
Walla Walla Water Co. *v.* Walla Walla, 172 U. S. 1.
Freeport Water Co. *v.* Freeport City, 180 U. S. 587.
Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685.
Skaneateles Water Works Co. *v.* Skaneateles, 184 U. S. 354.

151 In Skaneateles Water Works Co. *v.* Skaneateles, *supra*, the Supreme Court of the United States, by Mr. Justice Peckham, said:—

"There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

In Walla Walla Water Co. *v.* Walla Walla, *supra*, the city had acted under express legislative authority, and strictly within the limits of such authority in making a contract against the erection or operation of water works itself during the period of the contract, but the contract or grant did not undertake to deny the right to the city to grant similar easements in the streets to other persons, or public service corporations, and no attempt was made in the contract to make the grant exclusive as against a similar grant to other public service corporations or persons, and in regard to such a contract Mr. Justice Brown said:

"Had the privielge granted been an exclusive one, the contract might be considered objectionable upon the ground that it created

a monopoly without an express sanction of the legislature to that effect."

The reason for the rule of strict interpretation which denies to a municipal corporation the power by implication to vest exclusive rights or privileges in the streets or public service corporations is stated in a recent work on the subject as follows:

"Exclusive franchises in the nature of monopolies are not only presumed to be against public policy because prejudicial to the public welfare, but the granting of them may have the effect, or at least a tendency, to impede or hamper the city in effectually executing its municipal functions, and if this results, all such grants would be void. While it is a settled maxim of the law that municipal corporations cannot grant a perpetual franchise, or exclusive privilege constituting a monopoly which will enable the grantee at some future time to take advantage of the necessities of the people by fixing exorbitant and oppressive rates, the view taken by the courts is that the circumstances of each case must largely determine the nature and effect of such grant. 'Courts of last resort have generally refrained from propounding an authoritative affirmative definition of the 'monopoly' so odious to the common law and the genius of a free government. It would try the power of ex-
152 pression of most judges, if not human speech, to frame such a definition outside of which the grant or contract must wholly and clearly rest to escape the stroke of nullity. It has, therefore, been generally deemed wise and safe to use rather the process of exclusion, and determine what is not a monopoly so far as the case in hand required.'"

McQuillin on Municipal Ordinances, sec. 190, and cases in the notes.

It is not to be denied that practically this strict rule of interpretation may work hardship in a given case, but it is a rule which operates in the public interest and is based on grounds of public policy, and it is not to be doubted that in the main the rule operates beneficially in the protection of the public interest by keeping municipal corporations free from unwise or hasty contract limitation against their doing at any given time what the very best public interest may at that time demand.

In view of what is said I reach the conclusion that the attempt on the part of the defendant city to establish and operate a water works plant of its own is not in violation of the vested contract rights of the complainant, and that the contention in this regard is not supported by the weight of authority, although it does have the support of highly respectable authority.

Apart from the question of the jurisdiction of this court, which I do not regard as seriously doubtful, the case, taken as a whole, on all points, is somewhat close and difficult.

The refusal of a preliminary writ of injunction at this stage of the case, it is to be borne in mind, does not authorize anything to

be done. The effect is only to permit the city to proceed at its peril, and in the event steps shall be taken, or contracts made (unless conditionally) in advance of a final determination of the case on review, the allowance of a final injunction at the end of the litigation might, of course, produce embar-assment.

153 It results from the conclusions at which I have arrived that the demurrer in the first ground assigned is over-ruled, and in the second and third grounds sustained, and the bill dismissed, and of course the restraining order is dissolved and the injunction denied.

And it is so ordered.

(Signed) CLARK, Judge.

Endorsed: No. 1382. In the U. S. circuit court at Knoxville. Knoxville Water Co. against Mayor & Aldermen of Knoxville, *et al.* Opinion dismissing bill, &c. Filed Oct. 8, 1904, at 8:05 a. m. J. T. Carter, deputy clerk.

FRIDAY, October 21st, 1904.

Court met pursuant to adjournment.

Present and presiding, the Honorable C. D. Clark, judge, &c.

KNOXVILLE WATER COMPANY
vs.
MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE ET AL. } No. 1382.

Be it remembered that this cause was heard on this 21st day of October, 1904, before the Hon. C. D. Clark, judge, upon the entire record in the cause, but more especially upon the motion of complainant for an injunction against the defendants as prayed

154 for in the bill, and at the same time the demurrer to the bill, filed by the defendants on the 20th day of September, 1904, and which was set down for argument by complainant, and the court, having heard oral argument of counsel for both complainant and defendants, upon both the motion of complainant for an injunction and the demurrer of defendants to the bill, and having given full consideration to the entire matter is of opinion that complainant is not entitled to the injunction sought, its motion therefor is not well founded and the same is overruled.

The court is further of opinion that the first ground of demurrer interposed by the defendants, is not well founded in law and the same is overruled.

The court is further of opinion that the remaining grounds of demurrer interposed by defendants to complainant's bill are well founded and they are accordingly sustained.

It is therefore ordered, adjudged and decreed by the court that complainant's motion for an injunction be, and the same is hereby, overruled and disallowed, and the restraining order or temporary injunction, heretofore granted in the cause in favor of the complainant and as against defendants, is dissolved and discharged.

It is further ordered, adjudged and decreed by the court that the first ground of demurrer interposed by defendants to complainant's bill be, and the same is hereby overruled, and that the remaining grounds of demurrer interposed by defendants to complainant's bill, be, and they are hereby, sustained, and the bill is accordingly dismissed.

The complainant and United States Fidelity & Guaranty Co. surety, upon its prosecution bond will pay all the costs of the cause, for which execution is awarded.

The court handed down a written opinion, which is ordered
155 filed and is made a part of the record in the cause.

Enter this.

(Signed) CLARK, Judge.

Petition for Appeal.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

KNOXVILLE WATER COMPANY, Plaintiff,
vs.
MAYOR & ALDERMEN OF THE CITY OF Knoxville and W. L. Russell, F. J. Callan, E. G. Oates, J. Allen Smith, and J. Y. Johnston, Defendants. } No. 1382. In Equity.

Petition for Appeal to the Supreme Court of the United States.

The above named plaintiff, Knoxville Water Company, conceiving itself aggrieved by the final decree made and entered on the 21st day of October, 1904, in the above entitled cause, does hereby pray an appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

SHIELDS, CATES & MOUNTCASTLE,
Solicitors for Plaintiff.

156 Dated this 21st. day of October, 1904.

The foregoing claim of appeal is allowed on this 21st. day of October, 1904.

(Signed) C. D. CLARK, Judge.

Endorsed: No. 1382. Knoxville Water Co. *vs.* Mayor & Aldermen of the City of Knoxville, *et al.* Petition for appeal. Filed Oct. 21, 1904, J. T. Carter, deputy clerk.

Assignment of Errors.

In the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

KNOXVILLE WATER COMPANY, Plaintiff,
vs.
MAYOR & ALDERMEN OF CITY OF KNOXville and W. L. Russell, F. J. Callan, E. G. Oates, J. Allen Smith, and J. Y. Johnston, Defendants. } No. 1382. In Equity.

Comes now, plaintiff, Knoxville Water Company by its attorneys, Samuel G. Shields, Charles T. Cates, Jr., and R. E. L. Mountcastle, and prays an appeal from the final decree of this court, rendered in the above entitled cause, on the 21st. day of October, 1904, to the Supreme Court of the United States and assigns for error:

First. That the act of the General Assembly of the State of Tennessee, passed March 31, 1903, approved by the governor of
157 said State on April 3, 1903, and known as chapter 153 of the Session Acts of said General Assembly of the Year 1903, a copy of which is filed as Exhibit No. 10 to the bill in this cause, is in contravention of the Constitution of the United States, and especially of section 10, article 1 of said Constitution and section 1 of the 14th. amendment to said Constitution.

Second. That said act of the General Assembly of the State of Tennessee and the acts and doings thereunder by the defendant, Mayor and Aldermen of the City of Knoxville, and the other defendants constituting the Board of Water Works Commissioners of the City of Knoxville, and especially the election held by the defendant Mayor and Aldermen of the City of Knoxville for the purpose of determining whether it would issue bonds to build a system of water works in competition to the plant and property of plaintiff, Knoxville Water Company, the ordinance passed by defendant, Mayor and Aldermen of the City of Knoxville declaring the result of saif election to authorize the issuance of said bonds and the purpose of defendants to build and construct a system of water works to be run and operated in competition with the plant and property of the plaintiff, Knoxville Water Company—all as set out in the bill in this cause—are in contravention of the Constitution of the United States, article 1, section 10, and section 1 of the 14th. amendment to said Constitution, in that, thereby, are impaired the charter rights and franchises vested in plaintiff, Knoxville Water Company, and the obligations of the contract made and entered into by plaintiff, Knoxville Water Company, and defendant, Mayor and Aldermen of the City of Knoxville, on the first day of July, 1882, and the several amendments to said contract as set out in the bill in this cause;

and the obligations of the North Knoxville & West Knoxville
158 contracts, Exhibits Nos. 5 & 7 to the bill herein, and in that, thereby, plaintiff, Knoxville Water Company is deprived of its liberty and property without due process of law and denied the equal protection of the law.

Third. That said act of the General Assembly of the State of Tennessee is in contravention of the constitution of the State of Tennessee, and especially of sections 17–18 and 28 of article 2 of said constitution, as set out in the bill in this cause.

Fourth. The court erred in holding that the defendant Mayor and Aldermen of the City of Knoxville was without power to confer upon plaintiff, Knoxville Water Company, the exclusive right to furnish water to said defendant and its inhabitants during the period covered by said contract of July 1, 1882, that is, from the first day of July 1882 until the first day of August 1913.

Fifth. The court erred in holding that the defendant, Mayor and Aldermen of the City of Knoxville, did not by said contract of July 1, 1882, and the several amendments thereto, exhibited with and made a part of the bill in this cause, grant to and confer upon the plaintiff, Knoxville Water Company, the exclusive right to furnish water to said defendant and its inhabitants for and during the period covered by said contract.

Sixth. The court erred in not holding that the defendant, Mayor and Aldermen of the City of Knoxville, by said contract of July 1, 1882, and the several amendments thereto, all ratified and confirmed by the General Assembly of the State of Tennessee by an act passed January 29, 1903, and known as chapter 12 of the Session Acts of 1903, granted and conferred upon plaintiff, Knoxville Water Company, an exclusive franchise in the streets and public thoroughfares of said city and the exclusive right to furnish water to said
159 defendant city and its inhabitants for and during the period covered by said contract.

Seventh. The court erred in not holding that the defendant City of Knoxville by its several contracts with plaintiff water company and its dealings with said company, all as set out in the bill, estopped itself from building or attempting to build a system of water works to supply itself and its inhabitants with water during the life of said contract of July 1, 1882, that is, until August 1, 1913, and in not holding that said defendant city bound itself to carry out said contracts in good faith, and in accordance with the intention of both parties thereto, that is, that plaintiff water company should have the exclusive right to furnish water to defendant city and its inhabitants during the life of said contracts and until August 1, 1913.

Eighth. The court erred in failing to hold and decree that under and by virtue of its charter granted, had and obtained by the leave, consent and permission of defendant, Mayor and Aldermen of the City of Knoxville, and under and by virtue of its several contracts with said defendant, as set out in the bill, the plaintiff, Knoxville Water Company, has an exclusive right to furnish defendant city

and its inhabitants with water, for public, sanitary and domestic purposes until the first day of August 1913.

Ninth. The court erred in holding that the attempt on the part of defendant city, as set out in the bill, to establish and operate a water works plant of its own in competition with the plant and property of plaintiff, Knoxville Water Company, is not in violation of the vested charter and contract rights of plaintiff.

Tenth. The court erred in failing to hold and decree that the defendants had failed to comply with the plain terms of said
160 chapter 153 of the Acts of the General Assembly of Tennessee for the Year 1913, in that there *was* not submitted to the city council of defendant city for its consideration, plans, specifications and estimates of the cost and construction of a new system of water works, accompanied by a written opinion of a competent and disinterested expert as to the cost and present value of the plant and property of plaintiff, Knoxville Water Company; and, further, in that the defendant city through defendant water commissioners having secured from plaintiff a written proposition covering the sale of its plant, franchises, etc. under and in accordance with the aforesaid contract of July 1, 1882, wholly failed and refused to submit to a vote of the legal voters of defendant city, the question whether the property of plaintiff should be purchased under and in accordance with the terms submitted in said written proposition and wholly failed to submit to a vote of the legal voters of defendant city the question whether bonds should be issued for the purchase of the plant, franchises and property of plaintiff, Knoxville Water Company.

Eleventh. The court erred in failing to hold that the election held by defendant city on July 9, 1904, as set out in the bill, was illegal and void for the reasons therein stated.

Twelfth. That the court erred in sustaining the 2nd. and 3rd. grounds of the demurrer to the bill and in dismissing the bill.

Thirteenth. The court erred in refusing the motion for a temporary injunction, and in refusing to continue the restraining order pending the appeal.

Wherefore plaintiff prays that the decree of said circuit court be reversed.

SHIELDS, CATES & MOUNTCASLTE,
Solicitors for Plaintiff.

161 Endorsed: No. 1382. Knoxville Water Co. *vs.* Mayor & Aldermen of the City of Knoxville, *et al.* Assignment of errors. Filed Oct. 21, 1904. J. T. Carter, deputy clerk.

Appeal Bond.

Bond of Appeal to Supreme Court of United States.

Know all men by these presents, that we, Knoxville Water Company, as principal, and S. G. Shields, R. E. L. Mountcastle and Charles T. Cates, Jr., as sureties, are held and firmly bound unto the Mayor and Aldermen of the City of Knoxville, and to W. L. Russell, F. J. Callan, E. G. Oates, J. Allen Smith and J. Y. Johnston, in the full and just sum of five hundred dollars, to be paid to said obligees, their certain attorneys, successors, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

This 21 day of October 1904.

Whereas, lately at a circuit court for the northern division of the eastern district of Tennessee, in a suit pending in said court, between said Knoxville Water Company, plaintiff, and said Mayor and Aldermen of the City of Knoxville, W. L. Russell, F. J. Callen, E. G. Oates, J. Allen Smith and J. Y. Johnston, defendants, a decree was rendered against said plaintiff, Knoxville Water Company, and the said Knoxville Water Company having obtained an appeal and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit and a citation directed to said Mayor and Aldermen of the City of Knoxville, W. L. Russell, F. J.
162 Callen, E. G. Oates, J. Allen Smith and J. Y. Johnston, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 20th. day of November, 1904.

Now, the condition of the above obligation is such, that if said Knoxville Water Company shall prosecute its appeal to effect, and answer all damages and cost if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

In testimony whereof, we do hereunto sign our names and set our seals on the day and date first above written.

KNOXVILLE WATER COMPANY,
By CHARLES T. CATES, JR., Attorney.
SAM'L G. SHIELDS.
CHARLES T. CATES, JR.
R. E. L. MOUNTCASTLE.

This bond is approved.

C. D. CLARK, Judge.

Endorsed: No. 1382. Knoxville Water Co. *vs.* Mayor & Aldermen of the City of Knoxville, *et al.* Appeal bond. Filed Oct. 21, 1904. J. T. Carter, deputy clerk.

KNOXVILLE WATER COMPANY, Plaintiff,
vs.
MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE, W. L. Russell, F. J. Callen, E. G. Oates, J. Allen Smith, & J. Y. Johnston, Defendants. } # 1382.

163 Now comes the Knoxville Water Company, plaintiff in the above entitled cause, and files its assignment of errors, and its prayer for an appeal from the final decree herein to the Supreme Court of the United States at Washington, and for reasons satisfactory to the court appearing, said appeal is hereby granted and allowed, and a transcript of the record, proceedings and papers upon which said final decree was made, duly authenticated is hereby ordered to be sent to the Supreme Court of the United States as prayed in the petition for appeal. This Oct. 21st, 1904.

Enter this,

(Signed) CLARK, J.

Opinion Overruling Motion to Continue Restraining Order Pending Appeal.

KNOXVILLE WATER CO.
vs.
MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE.

Conceding (but not deciding) that in a case like this the court might continue the restraining order or maintain an injunction during the appeal allowed I conclude in view of the inconvenience and embarrassment which may result to the defendant as contrasted with any injury which can, within that time, happen to plaintiff, that I should deny the motion of the plaintiff for an order continuing the restraining order pending the appeal.

This leaves open to plaintiff such remedy (if any) as may
164 be available before the Supreme Court or a justice of that court.

(Signed) CLARK, J.

Endorsed: No. 1382. In the U. S. circuit court at Knoxville. Knoxville Water Co. against Mayor & Amdermen of the City of Knoxville, *et al.* Opinion overruling motion to continue restraining order pending appeal. Filed Oct. 21, 1904, J. T. Carter, deputy clerk.

KNOXVILLE WATER CO.
vs.
MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE ET AL. } No. 1382.

This cause came on to be further heard on this October 21st. 1904, upon the motion of plaintiff in connection with the appeal for an

order to continue, pending the appeal, the restraining order heretofore allowed or for injunction pending the appeal and upon due consideration thereof it is ordered that the motion in that behalf be overruled and denied to which the plaintiff excepts.

Enter this,

(Signed) CLARK, J.

165 The Supreme Court of the United States.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Mayor and Aldermen of the City of Knoxville, W. L. Russell, F. J. Callen, E. G. Oates, J. Allen Smith, and J. Y. Johnston, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington within thirty days from the date of this writ, pursuant to an appeal, duly allowed by the circuit court for the northern division of the eastern district of Tennessee, and filed in the clerk's office in said court on the 21st day of October 1904, in a case wherein The Knoxville Water Company is appellant, and you are appellees, to show cause, if any, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to said Knoxville Water Company in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21 day of October, 1904.

C. D. CLARK, Judge.

Service of a copy of the within citation is hereby admitted this 21 day of October, 1904.

JNO. W. GREEN,
J. W. CULTON,
R. H. SANSOM,
Attorneys for Appellees.

165½ UNITED STATES OF AMERICA, Eastern District of Tennessee, } *ss:*

I, Henry O. Ewing, clerk of the circuit court of the United States for the eastern district of Tennessee, do hereby certify that the foregoing one hundred and sixty four (164) pages of typewritten matter, contain a full, true and perfect transcript of the record and proceedings had in said court in the cause of Knoxville Water Company *vs.* The Mayor and Aldermen of the City of Knoxville, *et al.*, No. 1382, as the same appear of record and on file in my office, together with the original citation in said cause.

Witness my hand and the seal of said court at office in Knoxville, Tennessee, this 1st. day of November, 1904.

[The Seal of the Circuit Court, District of East Tenn.]

HENRY O. EWING, Clerk,
By J. T. CARTER,
Deputy Clerk.

Endorsed on cover: File No. 19,533. E. Tennessee C. C. U. S. Term No. 123. Knoxville Water Company, appellant, *vs.* The Mayor and Aldermen of the City of Knoxville *et al.* Filed November 17", 1904. File No. 19,533.

FILE COPY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
DEC 8 1905
JAMES H. McKENNEY,
Clerk.

KNOXVILLE WATER COMPANY,
Appellant,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE ET. AL.,
Appellees.

No. 123

BRIEF AND ARGUMENT FOR APPELLANT.

SAMUEL G. SHIELDS,
R. E. L. MOUNTCASTLE,
Of Counsel.

CHARLES T. CATES, JR.,
Solicitor.

S. B. NEWMAN & CO., KNOXVILLE.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905

KNOXVILLE WATER COMPANY, Appellant,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE, ET AL, Appellees.

No. 123

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF CASE.

May it Please Your Honors:

This suit was instituted by a bill in equity filed in the Circuit Court of the United States, sitting at Knoxville, Tennessee, by the appellant Knoxville Water Company, a Tennessee corporation, against the Mayor and Aldermen of the City of Knoxville, a municipal corporation, and certain citizens of that city constituting its Water Works Commission, for the purpose of enforcing, and preventing an impairment of, the rights of said company under certain contracts which had been entered into between it and said city, by restraining ap-

pellees, the City and its Water Works Commission, from building and operating under the authority of an Act of the General Assembly of Tennessee, a system of water works in competition with the plant, property and business of appellant.

A temporary restraining order was granted upon the filing of the bill, but upon demurrer the bill was dismissed and an injunction, or continuance of the restraining order refused, whereupon the Water Company prayed, and having assigned errors (Rec. pp. 96-98), was granted an appeal to this Court.

MATERIAL FACTS SHOWN IN THE BILL.

The bill, among other things, shows:

In 1880 the appellee City of Knoxville was, and for many years theretofore had been, a municipal corporation vested with full power and authority to provide itself and inhabitants with a supply of water for fire protection, public, sanitary and domestic purposes (Appendix A to this brief), but this power had not been exercised, so that the city was without a water supply, either for public purposes or domestic uses; however, about the year 1880, the city determined to build a water plant for the purpose of supplying itself and its inhabitants with water and to that end had prepared by one Moses Lane, plans and specifications for a complete system and acquired the necessary real estate upon which to locate a pumping station and reservoir, but after these things had been done, it became apparent to the corporate authorities that the construction and maintenance of a plant sufficient to supply the needs of the city and its inhabitants would involve a much larger sum than the city could safely assume and therefore it was determined by the proper authorities that the interests of the city and its inhabitants would be best subserved by entering into a contract with some individual company or private corporation to build a plant sufficient to supply water to the city and its inhabitants,

and thereupon the municipal authorities, by advertisement, invited bids and proposals for the construction of a water plant to be owned by the builder, but which the city should have the right to purchase at a certain period or periods to be agreed upon.

Rec., pp. 3-4.

To meet such conditions existing in said city, then having between nine and ten thousand inhabitants, and after the consent of the corporate authorities of appellee city had been duly obtained and endorsed on the application for a charter, as required by the act of the Legislature of Tennessee (Acts of 1877, Ch. 104. Appendix B), providing for the incorporation of water companies, a charter of incorporation was granted by the State to the Knoxville Water Co., appellant herein, for the purpose of investing it with the right and making it the duty of said Company to establish and construct a system of water works in or near said city of sufficient capacity to furnish the corporate authorities and the inhabitants of said city with water; and authorizing said corporation to enter upon the streets of said city and lay down therein its pipes and mains—to construct reservoirs and erect fire hydrants, and to supply water to the city and its inhabitants, and to contract both with the corporate authorities and the inhabitants of said city for the use of said water and charge such prices therefor as might be agreed upon between said parties.

Rec., pp. 3, 28-31.

In response to the advertisement made by the city for bids and proposals to construct a water plant, as above shown, the Knoxville Water Co. submitted, in competition with others, a proposition, which being deemed the most advantageous to the city, was accepted by it, and thereupon a contract was entered into between the city and the Water Company for the con-

struction, operation and maintenance of a system of water works by said Company of sufficient capacity to supply the city and its inhabitants with water for fire protection, public, sanitary and domestic purposes. This contract was exhibited with and made part of the bill, and thereby said Water Company, among other things, agreed:

(a) To erect and establish upon and on the land acquired by the city for that purpose, and in accordance with the plans and specifications prepared for the city by one Moses Lane, a system of water works **sufficient to supply the city and its inhabitants with water for all purposes stipulated in said contract,** to be taken from the Tennessee River at the site purchased by the city for that purpose.

Rec., pp. 4, 5-34.

(b) To purchase from the city the property acquired by it, including land, plans, specifications, etc., for the purpose of erecting water works and to pay therefor within thirty (30) days after the execution of said contract, and before commencing the construction of said works, the sum of $7,800.00.

Rec., pp. 5-35.

(c) To erect at the points designated upon said Moses Lane plan seventy-five (75) fire hydrants, and afterwards, from time to time, as many additional hydrants **as the necessity of the city might require.**

Rec., pp. 5, 34-35.

(d) To furnish water free of charge (except hydrant rental), to said city from such hydrants for flushing its sewers and gutters and for all purposes of the fire department, the City Hall building and offices and prisons therein.

Rec., pp. 5-35.

(e) To supply private consumers with water not to exceed a maximum rate fixed in the contract and to complete the construction of the plant within twelve months.

Rec., pp. 35-36.

(f) To maintain said water works in such condition as may be sufficient and necessary to enable said company to comply with its undertakings set out in said contract for a period of thirty (30) years from January 1st, 1883, unless said city should become the owner of said water works within that period in the manner stipulated in said contract.

Rec., pp. 5-36.

(g) To so amend its charter as to limit its bonded indebtedness to one hundred and fifty thousand dollars ($150,000.00).

Rec., pp. 5-37.

Among other things material to be noticed the city agreed:

(a) To grant and guarantee to said company all right to enter upon any and all of the streets, squares, lanes and alleys under its control.

Rec., pp. 5-37.

(b) Not to grant to any other person or corporation any contract or privilege to furnish water to the City of Knoxville, or the privilege of erecting upon the public streets, lanes, alleys or other public grounds for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty (30) years from the 1st day of August, 1883, provided the company complied with the requirements and obligations imposed upon and assumed by it under and by virtue of said contract and agreement.

Rec., pp. 5-37.

(e) To pay said company fifty dollars ($50.00) per annum for each fire hydrant erected under said contract, that is, all the hydrants that the necessity of the city might require.

Rec., pp. 5, 37-38.

Further it was mutually agreed that (1) at the expiration of fifteen years from the first day of August, 1883, **said city should have the right to purchase from said company all the property, rights, franchises and privileges provided in and growing out of said contract,** "by negotiation, if thus a price could be agreed upon, and if not, then at any time for a consideration to be fixed and determined by appraisers," in a manner specifically stipulated in said contract; and (2) **that said contract should not be assigned or transferred to any person or corporation whosoever.**

Rec., pp. 5, 6, 38-39.

The water plant provided for by said contract was duly built as therein, and within the time, stipulated. At this date the municipal limits of said city comprised only the first nine wards as they now exist, and the plant of said company in said wards was built in compliance with and under said contract.

Rec., p. 6.

After the Water Company had erected its plant and, as therein required, had been supplying, for some time, both the city and its inhabitants with water, the municipal authorities refused to pay the hydrant rental which had accrued under the contract upon the grounds, as claimed, that said contract was not valid and that the Water Company had not complied therewith. In a suit instituted by the Water Company to enforce said contract and collect the accrued hydrant rentals, both of said contentions were adjudicated against the city by

the Chancery Court of Knox County and, upon an appeal, by the Supreme Court of Tennessee.

Rec., pp. 6-7.

After this litigation had been determined in favor of the Water Company the contract of July 1, 1882, was, about February 9, 1888, amended so that, among other things favorable to the city, the hydrant rental was reduced from $50.00 to $45.00 per annum on all hydrants over one hundred.

Rec., pp. 8, 42-43.

On April 18th, 1891, the town of North Knoxville, then a municipal corporation contiguous to the City of Knoxville, entered into a contract with Wheeler and Parks, for the purpose of securing a supply of water for said town and its inhabitants until June 3rd, 1913, which contract, by permission of the corporate authorities of North Knoxville, was duly assigned to the Knoxville Water Company, who in all respects complied with its provisions by building and operating the water plant therein provided for. This contract was exhibited with and made a part of the bill.

Rec., pp. 8, 44-52.

In 1885 the General Assembly of the State of Tennessee provided another form of charter for water companies, different from that provided by the Act of 1877, under which the Knoxville Water Company was chartered, in that no right was reserved therein to regulate water charges or rates, and in the form prescribed by this Act, on July 28th, 1891, the Lonsdale-Beaumont Water Company was chartered for the purpose of establishing and constructing water works adjacent to the town of West Knoxville, then a separate municipality contiguous to the City of Knoxville, and by and in its said charter it was made the duty of said company, "to build water works

and provide machinery in or adjacent to said town of **sufficient capacity to supply said town and the inhabitants thereof with a plentiful supply of water,**" and on September 17th, 1892, said town of West Knoxville and said Lonsdale-Beaumont Water Company entered into a contract by which said Water Company agreed to erect and build, and did erect and build, a system of water works to supply said town and its inhabitants with water for a period of twenty years and reserved to said city the right to purchase said water plant after the expiration of seven years at such price as the parties might agree upon, or upon an appraised valuation, in the event the parties were unable to agree.

The power and authority vested by the laws of the State of Tennessee in said towns of North and West Knoxville in regard to water supply were set forth in their respective charters as follows: "**To provide the town with water works, or contract with others for water within or beyond the town limits, for town and corporate purposes.**" The charter of said Lonsdale-Beaumont Water Company and the contract entered into between that company and the town of West Knoxville are exhibited with and made parts of the bill.

Rec., pp. 8, 9, 53-56, 58-66.

By Chapter 323 of the Acts of the General Assembly of the State of Tennessee for 1897, the City of Knoxville and said towns of West and North Knoxville were consolidated—the town of West Knoxville becoming the Tenth Ward and the town of North Knoxville becoming the Eleventh Ward of the City of Knoxville—and by Sec. 8 of said Act of consolidation, it was enacted, "**that all valid and lawful contracts of the town of West Knoxville and of North Knoxville should be carried out and performed by the Board of Mayor and Aldermen of the City of Knoxville.**" So that said North Knoxville and West

Knoxville water contracts became obligations of appellee, the Mayor and Aldermen of the City of Knoxville.

In 1899 the consent of the appellee City of Knoxville was duly given, in compliance with the laws of the State of Tennessee, to the consolidation of the Knoxville Water Company and the Lonsdale-Beaumont Water Company, and, by ordinance duly passed on October 20th, 1899, and accepted by the Water Company on the same date, it was, among other things, agreed between said consolidated company, under the name of the Knoxville Water Company, and the City of Knoxville, that the right to purchase the plant and property of the original Knoxville Water Company, reserved by the city in said contract of July 1st, 1882, should be and was extended so as to cover all of the property, franchises, rights and privileges then owned by the Knoxville Water Company or which might thereafter be acquired by it; and that in order to fund the existing debts of said two companies and to provide funds to improve the consolidated plant and make extensions thereto, the limit upon the indebtedness of the consolidated company, provided in said contract of July 1st, 1882, was extended from one hundred and fifty thousand dollars ($150,000) to eight hundred thousand dollars ($800,000.00), with the provision that no bonds should be issued in excess of eight hundred thousand dollars, even for improvements, except upon a sworn certificate showing the actual cost of the additions or improvements for which such bonds should be issued.

Rec., pp. 10, 11, 67, 68, 69, 70.

In 1901 the City of Knoxville by ordinance arbitrarily reduced the rates which the Knoxville Water Company was then charging for water about 22 per cent. The Water Company denied the right of the city to regulate its rates, but it was determined in litigation between the Water Company and

the city involving that question, both by the Supreme Court of Tennessee (107 Tenn., 647), and by this Honorable Court (189 U. S., 434), that, notwithstanding the contract between the parties hereto, by virtue of the second section of the act under which the Knoxville Water Company was chartered, the City of Knoxville had the right to reasonably regulate the price of water furnished by said company to said city and its inhabitants. Thereupon said Water Company instituted a suit in equity in the Circuit Court of the United States at Knoxville, attacking the ordinance of said city reducing its rates, upon the ground, among other things, that the same was unreasonable and in violation of the 14th amendment to the Constitution of the United States and such proceedings had been had in said cause when the original bill in this case was filed, that the Master to whom the question had been referred had reported that said ordinance was unreasonable and invalid because the same would not yield said company a fair return upon the value of the plant used in furnishing water to said city and its inhabitants.

Rec., p. 12.

By 1903 there had been developed a strong feeling among the inhabitants of the City of Knoxville in favor of said city owning and operating for itself and its inhabitants a water plant, and to the end that the city might be enabled to enforce its right to purchase the plant and property of appellant, the representatives of Knox County, including the City of Knoxville, in the General Assembly of Tennessee, introduced, and pressed for passage by that body, a bill which was enacted into a law known as Chapter 12 of the Acts of 1903. This Act, a copy of which is exhibited with and made part of the bill (Rec., pp. 71-74), after reciting the execution of the contract of July 1, 1882, and the amendment thereto of October 20, 1899,

and the rights therein reserved to the city to purchase the plant and property of said company, and the desire of the city to enforce said right, authorized the city to issue a sufficient amount of bonds to pay for the plant and property of appellant to be determined by an appraisal under said contract, provided said appraisal and purchase should be approved by two-thirds of the qualified voters of said city voting in an election to determine that question.

Rec., pp. 13, 71-74.

Thereafter, during the same session of the Legislature, it developed, as alleged in the bill, by renewed agitation in the City of Knoxville that it was the desire of certain parties to pass another Act authorizing the said city to build and construct a plant to be run in competition with the plant of appellant, "so that such power and authority might be used as a club to compel said company to sell its plant for less than it was worth and to deprive it of its contract rights under its aforesaid contract of July 1st, 1882, and the ordinance contract of October 20th, 1899, and to enable the city to acquire the plant and property of said company upon its own terms freed from the provisions of said contract of July 1st, 1882, in respect of the appraisal of the plant and property" of said company; so that another bill was offered to the General Assembly authorizing said city to issue seven hundred and fifty thousand dollars ($750,000.00) of bonds to enable it to build and construct a separate and independent plant, coupled with certain provisions authorizing it to negotiate with said company for the purchase of its plant and property without reference to its contract rights hereinbefore referred to. This Act was passed on March 31st, 1903, approved by the Governor on April 3rd, 1903, and is known as Ch. 153 of the Acts of 1903, and was exhibited with and made a part of the bill.

Rec., pp. 13, 14, 74-80.

As provided in Sec. 4 of Ch. 153 of the Acts of 1903, certain citizens of said city, named as defendants in the bill, were appointed and elected members of a water works commission of said city, and after it had been organized by the election of a chairman and secretary, said commission addressed on September 28, 1903, a written communication to appellant calling attention to the power vested in it and asking whether appellant would sell to the City of Knoxville its plant and franchises, and, if so, at what price and upon what terms. To this communication the Water Company on October 19th, 1903, replied, in substance, that it recognized the right of the city to purchase its plant and property under the contract of July 1, 1882; that it was entirely willing to comply with all of the obligations imposed upon it by said contract and to sell to the city its plant and property at a price to be determined in the manner specifically provided in said contract, and further, after stating that there would be no serious disagreement in respect of the "terms" of payment when once a fair price should be determined upon, assured said commission that it would be pleased to at once take up the matter with the city authorities to the end that the provisions of said contract respecting the sale by the Company and the purchase by the city might be consummated. The Water Company received no further communication upon this question from either of the appellees, until on April 18, 1904, it received a communication from said commission, under date of March 22, 1904, wherein, after acknowledging receipt of the reply of appellant above referred to, it was stated that said commission had nothing whatever to do with the contract of July 1, 1882, and reiterated that said commission was acting alone, under and by virtue of the provision of said Ch. 153 of the Acts of 1903. Thereupon appellant, by written communication under date of April 27, 1904, again called attention to the specific provisions of the contract of

July 1, 1882, by which the city had the right to acquire the plant and property of the Water Company, repeating its recognition of the right of the city to purchase said property, and after stating that it did not desire to place any obstruction in the way of the city acquiring said property, called attention to the then pendency of litigation between the city and the Water Company wherein the value of the plant and property of the Company was one of the most material questions to be determined by the special master appointed for that purpose, and stated that it was not the desire of the appellant to do anything that might prejudice the interest of either party to that suit, or which might be construed into an effort so to do, and concluded with an offer to meet the city authorities at the earliest practicable date to arrange the necessary details for an appraisal. This correspondence is set out in the bill.

Rec., pp. 14-17.

Upon these facts the Water Company insisted that it had done all that it could do under the circumstances to assist the city in acquiring its plant but the Water Commission reported to the City Council that it had been unable to obtain from appellant a written proposition for the sale of its plant, franchises, etc., to the city, and recommended that the city immediately take the necessary steps to submit to the electors of the city the question whether bonds should be issued to build an independent and competing plant, which had been estimated to cost by one Ford $656,483.00 and by one Hill $677,730.00; whereupon "immediately" the City Council ordered an election upon the question of the issuance of bonds to build a separate and competing plant, and said election having been held on July 9th, 1904, it was declared by the City Council that the issuance of bonds had been authorized by the necessary two-thirds vote, and an appropriation was made for the purpose of

securing plans and specifications for building said plant. The election commissioners refused to submit to the voters the question whether the city should purchase the plant of appellant, although as it is averred in the bill, a large number of voters were deluded into voting for bonds by the statement of those advocating their issuance, that such bonds could be issued either to purchase the plant of appellant or to construct an independent system, and having, as claimed by appellees, procured plans and specifications for the plant intended to be built, steps were taken to secure a contract for the construction of such plant.

Rec., pp. 17, 18, 19-20.

The methods pursued by appellees in preventing a submission to the voters of the city of the question as to whether or not the property of appellant should be purchased, and the manner in which the election was ordered and held, were specifically attacked in the bill, but inasmuch as these are matters which do not go to the vital question at issue between the parties, and which could be remedied by appellees retracing their steps and amending their course of procedure, it is not deemed desirable by appellant to set out the details of the bill upon this point or renew in this court its attack thereon in respect of these matters, but to secure a determination of the one question which is practically essential to a continuance of its business without ruin and bankruptcy resulting therefrom.

A system of water works owned and operated by the City of Knoxville would not be subject to taxation for any purpose. The plant of appellant was, at the time of the filing of the bill, assessed at $418,000.00 upon which municipal taxes alone, amounting to more than $5,000.00, were paid. If the city were permitted to build and operate its own plant, the Water Company would be discriminated against in the matter of taxes and

its property and business forced to aid in the operation of its rival's plant.

Rec., pp. 23-24.

The plant of the water works has been built in strict compliance with its contracts with the city, it is of sufficient capacity to meet the needs of the city and its inhabitants and covers the entire ground within the city where there is any demand for a water supply and the company is able and willing to continue to comply with its contracts in every respect and to furnish all the water, at reasonable prices, needed by the city and its inhabitants.

Rec., pp. 20-25.

Though the Water Company is compelled under its contract to erect all the hydrants which the city may need, and is ready so to do, yet the city, having ordered of the company only two hundred and fifty long since erected, is about to erect some 575 hydrants upon the pipes and mains of the plant devised by said Ford.

Rec., p. 21.

That said Water Company had, under its charter and several contracts with the city, the exclusive right to provide water to said city and its inhabitants and that, relying on such right, its plant was built at a cost of several hundred thousand dollars; that its stock was subscribed and paid for and its bonds, amounting to $665,000.00, but comprising only a part of the cost of the plant, were sold to persons subscribing, purchasing and paying for the same, upon the faith of such exclusive right and with the distinct understanding that should the city within the period covered by said contract of July 1st, 1882, desire to own and operate a water plant, it would acquire

the plant and property of appellant at its fair value, to be determined by appraisal under said contract.

Rec., pp. 20-21.

That the declared purpose of the city was to build an independent competing water plant and that it was endeavoring to secure a contract with some person, firm or corporation to build such plant and to issue therefor its bonds, claimed to be authorized as the result of said election of July 9th, 1904, and that the result of such action upon the part of the city would be the practical confiscation of the plant and property of the Water Company and work irreparable loss and injury to said company.

That the building of such competing plant by the city will result in appropriation of its charter rights and franchises without due process of law.

That chapter 153 of the Acts of 1903 of the State of Tennessee and the doings of the appellees thereunder, as hereinbefore set out are invalid, not only because in contravention of the Constitution of the United States in that, thereby the obligations of the contract between the Water Company and the city were impaired, but also the property and franchises of the company would be taken without due process of law and said company deprived of the equal protection of the laws.

Rec., pp. 22, 24, 25.

Upon the foregoing facts, appropriate relief was prayed.

THE DEMURRER.

The grounds of the demurrer filed by defendants in the Court below were, in substance, as follows:

1st. The Court was without jurisdiction of the suit.

2nd. The bill, with its exhibits, does not show that the defendants have in any way impaired the obligations of the

contract rights of the Water Company, or have deprived, or will in any way deprive, said Company of its property and franchises without due process of law, in contravention of the Constitution of the United States and the 14th amendment thereto.

3rd. The bill fails to allege any fact or facts which show that the city and the Water Commission have done, or intend to do, or commit, any act which will impair the obligations of any contract between the city and the Water Company.

Rec., pp. 84-85.

THE OPINION OF THE CIRCUIT COURT.

The opinion of the Court below is, in brief, as follows:

(1) That the jurisdiction of the Court was clear.

Rec., pp. 86-87.

(2) That no other reasonable or just interpretation could be put upon the contract of July 1st, 1882 (if it had been made between individuals), when construed in the light of the circumstances under which it was made, than that the city thereby contracted not to erect and maintain water works on its own account during the running of said contract and that it could hardly be doubted that it was understood by both parties that the city would not engage in an enterprise which would come in direct competition with the Water Company's plant and business during the period covered by said contract.

Rec., pp. 90-91.

(3) That the legislature of the state had not in a franchise grant (that is the charter), made the use and occupation of the streets exclusive for a term of years, nor expressly authorized the city to do so, and that therefore the city was without authority to grant an exclusive right or franchise in its streets.

(4) That the city, being without legislative authority to make easements and privileges in its streets exclusive, even by express stipulation, was without power to confer upon the Water Company the exclusive right to furnish water to the city and its inhabitants, even during the period covered by the contract of July 1st, 1882, as claimed by said Water Company.

DECREE.

Under this opinion a decree was entered overruling the first ground of demurrer, sustaining the second and third grounds, dismissing the bill and refusing a continuance of the restraining order which had been allowed when the bill was filed.

Rec., pp. 94, 95, 100, 101.

ASSIGNMENT OF ERRORS.

1. The Court, being of the opinion (Rec., pp. 90-91) that no other just or reasonable interpretation could be placed upon the contract of July 1st, 1882, than that the City of Knoxville thereby intended to bind itself not to erect and maintain works on its own account, or in any way enter into competition with the plant of the Water Company, during the running of said contract, **erred** in not holding and decreeing that appellee, Mayor and Aldermen of the City of Knoxville, was bound by said contract not to erect and maintain a water plant to be operated in competition with property of appellant prior to August 1st, 1913.

2. The Court erred in not holding that the appellee, City of Knoxville, by said contract of July 1st, 1882, and the amendments thereto, estopped itself from building or attempting to build a system of water works during the life of said contract and in not holding that appellee city had bound itself to carry out said contract in good faith and in accordance with the in-

tention of both parties thereto, as found by the court, that is, that appellant should have the exclusive right to furnish water to appellee city and its inhabitants until August 1st, 1913, unless sooner the city should purchase the plant built for it under the right reserved in said contract.

3. The Court erred in not holding that, under and by virtue of the charter of the Knoxville Water Company and of the Lonsdale-Beaumont Water Company and the several contracts between said companies and the City of Knoxville and the towns of North and West Knoxville, with the amendments thereto, as exhibited with and made a part of the bill in this cause all of which were ratified and approved by the General Assembly of Tennessee, by an Act passed January 29th, 1903, and known as Ch. 12 of the Acts of 1903 (Rec., pp. 71-74), there was conferred upon appellant, Knoxville Water Company, an exclusive franchise in the streets of appellee, City of Knoxville, and the exclusive right to furnish water to said city and its inhabitants during the continuance of said contracts.

4. The Court erred in not holding that chapter 153 of the Acts of 1903 (Rec., pp. 74-80), and the doings of appellees thereunder, looking to the building of a system of water works to be operated in competition with the plant and business of appellant, are in contravention of the Constitution of the United States, Art. 1, Sec. 10, in that thereby are impaired the charter rights and franchises of appellant and the obligations of the contract of July 1st, 1882, and the amendment thereto of October 20th, 1899, Exhibits 3 and 8 to the bill (Rec., pp. 34-41, 66-70), and of the North and West Knoxville contracts, Exhibits Nos. 5 and 7 to the bill (Rec., pp. 44-53, 58-66), and also in contravention of the Fourteenth Amendment to said Constitution, Section 1, in that, thereby, appellant is deprived of its liberty and property without due process of law and denied the equal protection of the law.

BRIEF AND ARGUMENT.

We respectfully submit to Your Honors that the learned Judge, before whom this case was tried in the court below, wholly failed to distinguish between the franchise rights or easements of appellant in the streets of the City of Knoxville and the mutual or reciprocal rights, obligations and duties of both appellee city and appellant Water Company under the contracts between them and erroneously concluded that the obligation of appellee to refrain from constructing and operating water works on its own account was dependent upon the exclusive character of appellant's franchise rights or easements in the streets, and, being of the opinion that appellee city was without legislative authority or power "to make easements and privileges in the streets and alleys of the city exclusive (even) by express stipulation," held, in effect (Rec., pp. 90, 91), that appellee city was not bound to observe, but might breach with impunity, its contract upon which "no other reasonable or just interpretation could be put" than that thereby the city had agreed not to erect and maintain water works in competition with appellant, during the life of said contract.

The learned Judge also confused the charter of appellant with that of a street railroad company, and fell into the inaccuracy of saying (Rec., p. 90), that while in Tennessee **a public service corporation like appellant** must and does obtain its corporate franchises from the state, yet it **deals by contract** with the municipality in obtaining its permission to the use and occupation of its streets. If by this it was meant that the rights of way or easements in the streets of the City of Knoxville arose and grew out of its contract with said city, dated July 1st, 1882, the error is manifest from a mere examination of the charter of appellant. The rule stated by the learned Judge applies to street railroad companies who can not obtain

a franchise or right of way in the streets of a municipality until an ordinance has been passed granting the right and specifically designating the route. **But appellant derived not only its corporate franchises but also full authority to enter upon and occupy the streets of appellee from the State, through its charter, and not from the city by contract.** It is true that before said charter could be granted it was necessary to obtain from the corporate authorities leave to operate thereunder in the said city, and this was done without condition, restriction or limitation, as shown by the endorsement of such consent on the charter itself. (Rec., p. 31); nevertheless, the Act under which the Water Company was chartered clearly shows that its rights of way and easements in the streets of said city were, by the state, conferred upon and directly vested in said company through its charter, upon acceptance thereof. And such is the rule in Tennessee, unless the contrary is plainly shown.

Railroad vs. Adams, 3 Head, 597.

Citizens St. Ry. Co. vs. Africa, 100 Tenn., 83.

While we are of the opinion that the rights of way or easements of appellant in the streets of said city were, in practical effect, and by necessary implication, exclusive for a period of thirty (30) years, nevertheless, from the view we take of the case, the granting of the relief sought by appellant is not dependent upon either its franchises or easements in the streets being exclusive, or the power of the city to grant an exclusive right of way or easement in the streets; but, because it is helpful to a correct understanding and interpretation of the contract between the parties to bear in mind the fact that appellant's authority to enter upon and rights in the streets emanated directly from the State, we have thought proper to correct the inaccuracy into which the Judge fell by confusing the charters of two separate corporations and therefore we invite the attention of the Court to the difference between the

Acts authorizing the incorporation of water companies (Appendix B) and street railroad companies (Appendix C).

And now, without regard to the question as to whether an exclusive right of way or easement in the streets of appellee city was conferred upon appellant by its charter, or whether said city had legislative authority to grant an exclusive right of way or easement in its streets, the contention of appellant, briefly stated, is:

1. **That on July 1st, 1882, a contract was entered into between appellant and appellee city, whereby, in consideration of the agreement of appellant to build and maintain for a period of thirty (30) years a system of water works sufficient to supply said city and its inhabitants with water for fire protection, public, sanitary and domestic purposes, appellee city agreed and bound itself not to erect and maintain, in competition with appellant, a system of water works to supply itself and its inhabitants with water, during the continuance of said contract.**

In support of this proposition, we respectfully insist:

(a) It was the right and duty of appellee city to contract for a supply of water both for itself and its inhabitants, and appellant was fully empowered to provide such supply and contract with the city therefor.

(b) No reasonable or just interpretation can be placed upon said contract, in the light of the circumstances under which it was made, than that the city by necessary implication agreed thereby not to erect and maintain water works on its own account, in competition with appellant during the life of said contract.

(c) That if the city desires to engage in the business of furnishing water to itself and its inhabitants prior to August 1, 1913, good faith requires that it, under and by virtue of the

right reserved in said contract, shall purchase the plant and property of appellant.

(d) Even if at the time said contract was executed appellee city lacked legislative authority to enter into an agreement conferring the sole right and authority upon appellant to furnish water to said city and its inhabitants for a period of thirty years, said appellee city is now estopped to set up and plead any such supposed want of authority, and, moreover, since said contract was entered into, not only has full authority been conferred upon said city by the legislature in respect of the subject matter of said contract but said contract has been expressly recognized and approved by the Legislature of Tennessee (Acts of 1903, Ch. 12), and appellee authorized to consummate its rights thereunder by a purchase of the plant and property of appellant.

2. That this is not a case where a contract is sought to be implied with a municipality from a mere grant or license to do business therein, but one seeking to enforce the reasonable and plain meaning, and to prevent the impairment of, a contract actually entered into, within the power and authority of both parties.

We submit that the questions involved are ruled by the holding of this Court in the case of Walla-Walla Water Co. vs. Walla-Walla, 172 U. S., 1, and that the case on its facts is distinguished from the cases relied upon by the learned Judge (Rec., pp. 89, 92) to support his decision—which cases, however, as we shall endeavor to show, are not only plainly distinguishable on their facts from the one at bar, but in their reasoning support the contention of appellant.

I.

Both the City and the Water Company were fully empowered to execute the contract of July 1st, 1882.

AS TO THE POWERS OF THE CITY.

We submit that it is not only one of the ordinary powers of a municipal corporation to furnish a supply of water for itself and its inhabitants, either by the erection of a municipal water system, or by contracting with other persons, companies or corporations for such supply, but that such authority is to be found among the powers expressly conferred upon the City of Knoxville at the time it entered into the contract of July 1st, 1882, as shown by the excerpts taken from the various acts of the General Assembly of Tennessee incorporating and conferring powers upon the City of Knoxville, set out in "Appendix A." An examination of these statutes shows that the city had been authorized, among other things, to receive and hold property, real and personal, for the erection of water works and other public purposes, and do all acts touching the same as natural persons; to make regulations to secure the general health of the inhabitants; to provide the city with water by water works within or beyond the boundaries of the city; to provide for the prevention and extinguishment of fires; and to do all things and to pass all ordinances not contrary to the constitution and laws of the State that might be necessary to carry out the full intent and meaning of said acts; and to accomplish the object for which said City was incorporated.

In view of these powers expressly conferred upon said city it would seem unnecessary to cite authority in support of the proposition that thereby the city was fully empowered to furnish and provide a water supply for itself and its inhabitants, either by building municipal works or contracting with others therefor. However, looking to the authorities, we find the proposition contended for amply supported.

As respects the implied authority of a municipal corporation to procure a supply of water, such power has been held to be implied from the grant to a municipal corporation of the

power to make all contracts which may be deemed necessary for the general welfare, or to provide means of extinguishing fires.

In **Rome vs. Cabot, 28 Ga., 50,** under authority to make contracts for the general welfare, it was held that the city had the right to make contracts for the construction of water works.

In **Livingston vs. Pippin, 31 Ala., 542,** it was held that the city council, having power to provide for ordinary expenses of the town, had power to procure a supply of water in a public square, and were themselves the judges of the mode best calculated to accomplish that object, on the ground that nothing was more important as a sanitary and police regulation than an abundant supply of water.

The power to contract for a water supply is necessarily involved in the general welfare of the municipality, and need not be expressly granted to it in its charter by specific words. This power has been implied from the grant of the right to prevent and extinguish fires, or to provide for the general health and welfare of the city.

Hardy vs. Waltham, 3 Met. (Mass.), 163.

Webb City Water Works Co. vs. Webb City, 78 Mo. App., 422.

Aurora Water Co. vs. Aurora, 129 Mo., 540.

In **Lake Charles, etc., Co. vs. Lake Charles, 106 La., 65,** it was held that even if no provision therefor is made by statute, a city has implied power to contract for water.

While it is well settled that a municipal corporation possesses, and can exercise, only those powers expressly granted, or those necessarily or fairly implied in or incident to the powers expressly granted, and when there is any fair, reasonable doubt concerning the existence of power such doubt is to be resolved against the corporation, nevertheless it is equally well settled that the fundamental and universal rule, which is

as reasonable as it is necessary, is, that the construction to be placed upon the legislative grant is to be just, seeking first of all for the legislative intent in order to give it fair effect. Further, the rule of strict construction of corporate powers is not so strictly applicable to the ordinary clauses in the charters of incorporating acts of municipalities as it is to the charters of private corporations.

Dill., Mun. Corp. (4th Ed.), Secs. 89, 91.

In Tennessee, the rule is thus stated:

> A corporation exists alone by virtue of its act of incorporation and it can exercise no powers but such as are the result of necessary or proper implication. The powers of a corporation being exercised, then, under delegated authority, are to be strictly construed. * * But this construction has never confined the execution of the power to the word and letter, but everything necessary and **proper** for carrying into execution the granted powers has always been conceded by the strictest constructionists.
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> **Nichol vs. Nashville, 9 Humph., 261-2.**

These principles were applied by the Supreme Court of Tennessee in the case of the **City of Memphis vs. Memphis Gayoso Gas Co., 9 Heisk., 530, 537, 538,** to authorize the City of Memphis, empowered by its charter "to purchase and hold real estate for gas works, and to do all things a natural person might do touching the same," to procure a supply of gas by subscribing for stock in a gas company.

In this case, in the course of its opinion, the court said:

> **"The preservation and protection of the lives and property of the citizens of the city are leading objects for which a charter is granted, and the charter of Memphis distinctly recognizes the use of gas in furnishing light as a legitimate mode of effectuating these**

objects. There is no express power in the charter to buy gas with which to light the city, nor any express power to erect works and manufacture it, but if the agents of the corporation regard either of these modes of getting and supplying the gas as necessary and proper, they have the implied power to so procure a supply. * * * In the case of Nichol vs. Nashville, 9 Humph. (Tenn.), 270, Judge Turley said: 'If a corporation may make the road (referring to a steam railroad) may it not join with others to make it? If the undertaking be too expensive to be carried into execution by a corporation itself, or if others be desirous of uniting with it for the effectuating of the design, why may they not unite? Again, it may be asked, is there anything wrong in this? Is there anything against the public good in this? Is there anything against the law in this? Surely not.'

"In like manner, we may ask, Why is it that if the corporation has not money or credit enough to erect works and make gas, which it could lawfully do, it may not use the money or credit it has to enable a company to form and manufacture gas? Does the charter authorize the corporation to use money or credit enough to build gas works entire, and yet it has not power to use enough of its money or credit to build them in part, or to aid others in building them? Is it less lawful to get gas by contributing part of the means necessary to produce it, than to contribute the whole? There can be but one answer to these questions. **Whenever the lighting of the city with gas is found to be a corporate purpose, then, upon the strictest construction of the powers of corporations, everything necessary and proper for carrying into execution the granted powers may be lawfully resorted to.**"

We submit that if a municipal corporation may lawfully lend its credit to, or subscribe for stock in a public service corporation, for the purpose of securing a supply of gas or water,

upon what principle can it be urged that it is unlawful or beyond its just powers to purchase such supply of gas or water, and having paid a reasonable price therefor, incur no further or other liability such as might result either from extending its credit or becoming a stockholder in such public service corporation.

In the language of Judge Turley, "Is there anything against the public good in this?"

It will be noted that among the express powers conferred, the City of Knoxville was not only authorized to receive and hold real estate for the erection of water works, and do all things touching the same as a natural person, but also to provide the city with water works within or beyond the boundaries of the city—to make regulations to secure the general health and to provide for the prevention and extinguishment of fires.

Calling the attention of Your Honors to the contract itself (Rec., pp. 34-41), it will be found that it is entitled, "**Articles of agreement for the construction of water works for the City of Knoxville,**" and that its purpose was and is to supply said city and its inhabitants with water for fire protection and public sanitary and domestic purposes, thus covering and responding to the specific powers enumerated above. How, we ask, could the city provide for the prevention and extinguishment of fires or make proper and adequate regulations to secure the general health of the inhabitants of the city except by and through a supply of water which it was unable to furnish except by contract with appellant?

The learned Circuit Judge, in his opinion (Rec., p. 92), cited the case of **Memphis vs. Memphis Water Co., 8 Baxt., 589,** upon a proposition, which as a general rule admits of no doubt, but this case, decided in 1876, and before the contract between the city and the Knoxville Water Co., was entered into, is ex-

press authority for the proposition that a municipal corporation may lawfully contract for a supply of water.

The questions involved in this case were as follows: The Supreme Court of Tennessee had held (City of Memphis vs. Memphis Water Co., 5 Heisk., 594), that said Water Company, under a *legislative* charter, had an exclusive franchise or privilege to furnish water to the City of Memphis for a period of 25 years. This decision was in 1871. As a consideration for such exclusive privilege it was provided in section 10 of the charter of said company that "said company shall furnish water to the City of Memphis sufficient to supply the public offices, police stations, hospitals and engine house and for extinguishing fires, free of charge;" but in January, 1872, the city and the water company entered into a contract by which the city subscribed for one thousand shares of the capital stock of said company and undertook to rent from the water company a large number of hydrants at certain stipulated prices, and these hydrant rentals aggregated between $30,000 and $40,000 per annum. The court held:

1. That under its charter, it was the duty of the water company to furnish free of charge, all water necessary for the extinguishment of fires, etc.

2. That the water company being invested with the exclusive privilege to supply said city and its inhabitants with water, the city was prohibited from supplying itself and its citizens with water, and therefore being without power to provide such supply, was without authority to contract therefor. Upon this last point the court said:

> "If there had been by the charter (of the water company) no inhibition upon the city to supply water, **but that natural duty** had been left still imposed on the officers of the city corporation, then, as in the **Gayoso Gas Co. case**, decided at the last term, the city might,

for such necessary corporation purpose, have contracted for the supply of water."

Memphis vs. Memphis Water Co., 8 Baxt., 587-9.

The learned Judge also cited (Rec., p. 92), the case of **Railroad Co. vs. Memphis, 3 Shannon's Tenn. Cases, 193,** but, with all respect, we submit that not only were the facts involved in that case different from those in the case at bar, but if the holding of the court bears at all upon the questions before Your Honors for determination, the necessary implication therefrom is favorable to the contention made here on behalf of appellant.

The actual point decided in that case was, that where a charter of a railroad company was on condition that it should secure the consent of the City of Memphis before it could be entitled to or exercise franchises or easements in the streets of such city, said railroad company had no rights or franchises in said streets without such consent. Speaking for the Court, Special Judge Howell E. Jackson, afterwards an honored member of this Court said:

> "It was conclusively settled in the Supreme Court of this State and of the United States, in the cases of Memphis City Railroad Co. vs. Mayor, etc., 4 Cold., 405, 413, 416, and People's Passenger Railroad Co. vs. Memphis Street Railroad Co., 10 Wall. (U. S.), 38-55, that said corporation, the People's Passenger Railroad Co. of Memphis, never procured or obtained the city's consent to its use of any of the streets for the purpose of operating street railways thereon, as provided by the fourth section of the act of incorporation, and by the resolution of the Board of Mayor and Aldermen when permission was given for Small and his associates to procure said act (of incorporation.)"

Upon petition to re-hear being filed, the Court, speaking through Chief Justice Nicholson, said:

"The application for a rehearing rests upon the assumption that the city of Memphis entered into a contract with the adventurers, by which the city was bound to give its consent to the charter of the People's Passenger Railroad Company, when the same should be granted by the legislature, and would then consummate their contract for street railways with the company so chartered; and that the city violated this contract by refusing to consent to the charter when granted, for which violation the adventurers are entitled to damages. This question was considered and passed upon in the opinion already delivered; and it is only necessary now to say that, when the city agreed that the adventurers might procure a charter for the purpose of carrying out the contract made with the adventurers, the city expressly reserved the right to withhold its consent from the charter, and in the charter itself this right is reserved to the city; that the city did not give its consent to the charter was adjudicated in this court and in the United States Supreme Court; and it is manifest, both upon the face of the ordinance permitting the charter to be procured, and upon the face of the charter, that the city was not bound to consent to the charter, but was left free to consent or not, when the charter should be procured. Its refusal to consent was, therefore, no violation of its contract, but was the exercise of a discretion expressly reserved. This was the holding of the court in the opinion already delivered, and we are satisfied with its correctness. The petition for rehearing is therefore dismissed."

We call the attention of the Court to the vital difference between the facts of this case and the one at bar. In that case the incorporators of the railroad company never procured the consent of the City of Memphis to the act of incorporation, which was made an express condition to the exercise of the franchises conferred by the charter on the railroad company.

In the case at bar, the record shows that it was also a condition precedent to the granting of the charter of the Knoxville Water Company that the consent of the municipal authorities should be obtained, and that leave to operate thereunder should be endorsed on the application for the charter. This was done, as hereinbefore stated, by the corporate authorities of the City of Knoxville, without condition, restriction or limitation.

WAS THE WATER COMPANY AUTHORIZED TO ENTER INTO SAID CONTRACT?

The answer to this question is found in the charter of the Water Company itself. (Rec., pp. 28-31). Prior to the Constitution of 1870, all grants of corporate franchises were by special acts of the legislature; but this was changed by that Constitution, which provided for the issuance of charters under general laws to be enacted by the General Assembly. The language of the Constitution (Art. 11, Sec. 8) is as follows:

> "No corporation shall be created, or its powers increased or diminished, by special laws, but the General Assembly shall provide by general laws for the organization of corporations hereafter created, which laws may at any time be altered or repealed, and no such alteration or repeal shall interfere with or divest rights which have become vested."

The first act, under the Constitution of 1870, providing for the organization or incorporation of water companies, was chapter 104 of the Acts of 1877 (Appendix B), and under the authority of this act, and in the form therein prescribed, the Knoxville Water Company was incorporated, for the express purpose of supplying the City of Knoxville and its inhabitants with water, and for such purpose it was authorized to enter upon the streets and other public thoroughfares of the city to lay down its pipes and erect its works; and it was specially

authorized not only to bring a sufficient supply of water into the city to supply said city and its inhabitants with water, and to erect hydrants or fire plugs within said city, but also to contract with the corporate authorities of said city and its inhabitants for the use of said water, and charge such price for the same as might be agreed upon between said company and said parties. Therefore, it will be seen that the Water Company was not only chartered for the express purpose of supplying the city and its inhabitants with water, but there was conferred both upon it and the corporate authorities of said City, full power to make contracts for the use of said water and agree upon the charges therefor, reserving, however, to the city, under the second section of said act, power to regulate the rates and charges of the Water Company. If the city had not been authorized by and through its own charter, or had it not been invested with what the Supreme Court of Tennessee, **supra,** (8 Baxt., 589) termed a "natural duty" to contract for a supply of water, full power and authority would have been, and was in fact conferred upon the city to make such contract in and by the foregoing provision contained in the charter of the Water Company, because it is settled law in Tennessee that a power may be conferred upon a municipality by an independent act incorporating a private corporation.

Nichol vs. Nashville, 9 Humph., 258-265.

Further, we submit and respectfully insist that the question of the power of both parties hereto to make the contracts relied upon by appellant—their validity and exclusive character for a period of thirty years, have already been adjudicated, but this point will be more fully considered under another head.

II.

And now, having found that the City and the Water Company had full power and authority to enter into the contract of July 1st, 1882, let us see what the parties, thereby, intended to, and, in fact, did agree upon. We submit:

No other reasonable or just interpretation can be placed upon said contract than that the city thereby agreed not to erect and maintain water works on its own account, in competition with appellant, during the continuance of said contract.

Upon the construction of said contract, the learned Judge said:

> "In the ordinary case of a contract between individuals like the one here between the city and complainant I might be strongly disposed to hold that the city had contracted by necessary implication not to erect and maintain water works on its own account during the running of the contract with complainant; that is for the 30 year period. No other reasonable or just interpretation could be put upon this contract, in the light of the circumstances under which it was made.
>
> "The city had at that time been in a proper way considering the question of building a water works plant of its own, and had made certain preparations for that purpose by securing suitable parcels of land, or real estate.
>
> "In its contract with this complainant, the complainant was required to take and pay for that property, and it was accordingly conveyed to it, which obviously could signify nothing else than an intention on the part of the city at that time to abandon its own place of erecting or maintaining water works, in view of the contract made with the complainant.
>
> "To induce the complainant to expend its money and engage in the enterprise of furnishing the city and its inhabitants needed water, the city undertook

expresaly to protect the complainant in the enjoyment of its rights by a term or provision in the contract that it would not grant a similar right to any other person or corporation during the life of the contract. This desire to induce the investment of the capital and the purchase from the city of the real estate previously secured for the purpose of the plant, would obviously fail to afford protection if the city should itself, during the same period, erect and operate a water works plant of its own, and in that way come in direct competition with the complainant.

"It is hardly to be doubted that it was understood by both parties that the city would not itself engage in such an enterprise and in that way enter into direct competition with the complainant company during the contract. Such a view would, in effect, be no more than to require on the part of the city that it would act in good faith in relation to the contract with the complainant. Or, to state the proposition in the very language of the Supreme Court of the United States, in Walla Walla Water Co. vs. Walla Walla, 172 U. S., I:

" 'As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.'

" 'An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years.'

"In Tyrone Gas & Water Co. vs. Tyrone, 195 Penn., 566, it was declared by the court that competition, especially on the part of a municipality, is a virtual confiscation of property."

Rec., pp. 90, 91.

If the learned Judge was correct in his interpretation of the contract, and we insist that no other reasonable construction can be placed thereon, then, we submit, he was in error in refusing to enforce the provisions or to give effect to the intention of the parties as set out in said contract.

We have shown that the purpose of the contract was within the powers of the city, and we understand the law to be that a contract entered into within the authority of a municipal corporation, shall receive the same construction as though it had been entered into between individuals. The purpose of the contract was not to govern the inhabitants of the city, but to obtain a private benefit for both the city and its inhabitants—that is, the purpose was within the business and proprietary powers of the city, as distinguished from its governmental and legislative functions.

Illinois Trust & Savings Bank vs. Arkansas City, (C. C. A.), 76 Fed. Rep., 271.

Cunningham vs. City of Cleveland (C. C. A.), 98 Fed. Rep., 657, 663.

Western Sav. Fund Soc. vs. Philadelphia, 31 Pa. St., 175.

Bailey vs. New York, 3 Hill (N. Y.), 531.

Brumm's Appeal (Pa. 1886), 12 Atl. Rep., 855.

But before proceeding further with the discussion of this question, let us ascertain whether the interpretation placed by the Judge upon the contract can be sustained. It is a well settled canon of construction, applicable to the interpretation of contracts, that courts may acquaint themselves with the persons and circumstances that are the subjects of the written agreement, and place themselves in the situation of the parties who made the contract; view the circumstances as they viewed

them, "so as to judge of the meaning of the words, and of the correct application of the language to the thing described."

Goddard vs. Foster, 11 Wall., 123, 143.

Guarantee Co. vs. Mechanics Savings Bank & Trust Co. (C. C. A.), 80 Fed. Rep., 766, 778.

What was the situation of the parties? The city had long been charged with the duty of supplying itself and its inhabitants with water, and about the year 1880 took some preliminary steps towards performing such duty, by purchasing certain real estate and procuring a full set of plans for a water plant sufficient to supply itself and its, then, ten thousand inhabitants. Having gone thus far, it became apparent to the corporate authorities that the building and maintenance of a plant sufficient to meet the demands of the city and its inhabitants would involve a much larger sum than the city could safely assume, in view of the risks and uncertainties incident to such pioneer venture, so that, it was determined that the interests of the city and its inhabitants would be best subserved by procuring a water supply through a plant to be built by some individual, company or corporation, who would agree to give the city the right to purchase such plant at some time to be agreed upon, and therefore the Water Company was chartered for the express purpose of meeting this situation, and its bid, or proposition, submitted in competition with the bids and propositions of other persons, was accepted by the city, and in due time a formal contract was entered into, which is known in this record as the contract of July 1st, 1882, and is entitled "Articles of Agreement for the construction of water works for the City of Knoxville." By this contract, among other things, the Water Company agreed:

To erect and establish on the land acquired by the city for that purpose and in accordance with plans procured by the

city, a system of water works sufficient to supply said city and its inhabitants with water for all the purposes therein stipulated, that is, fire protection, public, sanitary and domestic purposes.

To purchase from the city at the price of $7,800.00, the property, plans, maps, etc., which the city had theretofore acquired for the purpose of erecting water works on its own account.

To erect, at certain points designated by the city, a certain number of fire hydrants, and afterwards as many additional hydrants as the necessities of the city might require.

To furnish free of charge (except hydrant rental) water from such hydrants for flushing the sewers and gutters, and for all purposes of the fire department, city hall buildings and office and persons therein.

To provide private consumers with water at not to exceed a certain maximum rate.

Thus all the purposes for which the city and its inhabitants might require water were covered, and in order that there might be no uncertainty in regard to the continuing obligation upon the part of the company, it was further expressly stipulated that it should maintain said water works in such condition as may be sufficient and necessary to enable it to comply with all of its undertakings set out in said contract, for a period of thirty years from January 1st, 1883, unless the city should become the owner of said water works within that period in the manner provided in said contract; and to prevent an excessive encumbrance of said plant with bonds which might pass into the hands of innocent holders, and thereby complicate or embarrass the city's reserved right to purchase, it was further agreed that the Water Company would so amend its charter as to limit its bonded indebtedness to $150,000.00.

Rec., pp. 35, 36, 37.

Now, it will be observed, that the city was to have water free of charge, except hydrant rental, for every possible corporate purpose, and it agreed to pay fifty dollars per annum for each hydrant erected under such contract, and the company was required to so lay its pipes and mains that they would be sufficient to support all the hydrants which the necessities of the city might require. Thus was covered and provided for, every municipal purpose. In addition to this, it expressly agreed and bound itself not to grant to any other person or corporation any contract or privilege to furnish water to the city of Knoxville or the inhabitants thereof, for the full period of thirty years from the first day of August, 1883, provided the Water Company should comply with the requirements and obligations imposed upon and assumed by it under and by virtue of said contract. (Rec., p. 37.)

In addition to this it was also agreed that at any time after the expiration of fifteen years from the first day of August, 1883, that is, the date fixed for the completion of said water works, the city should have the right to purchase all of the property, rights, franchises and privileges belonging to the Water Company, or growing out of said contract, at a price to be agreed upon between the parties by negotiation, and, if the parties could not agree in regard to the price, at a price to be fixed and determined upon in an eminently fair and just manner by appraisers, in a manner specifically provided in the contract.

The water system provided for in this contract has been, at the cost of many hundreds of thousands of dollars, built and maintained by the Water Company, and its stock has been subscribed and bonds purchased upon the belief and with the understanding that the city, by said contract, intended to agree and bind itself and had agreed and bound itself, not to erect and maintain a water plant in competition with the plant and

property of appellant, prior to the first day of August, 1913, unless before that time the city, desiring to resume its natural duty of supplying water to itself and its inhabitants, exercised the right of purchasing the plant and property of appellant as provided in said contract.

Now, what was the intention of the parties in entering into this contract? Can it be supposed that either this Water Company, or any other company or person, could have been induced to enter into the undertakings imposed upon it by said contract, unless it was certainly understood that thereby the city would not enter into competition with the plant which was in effect being erected for it? The contract covers every possible use for which the corporate authorities of the city could require, and obligates the Water Company to maintain its works in such condition as may be sufficient and necessary to enable it to comply with all of its undertakings for a full period of thirty years, unless the city should purchase such water works within that period, under the right reserved to it by and as a part of said contract. Can it be supposed that the Water Company could be required to keep its plant in such condition as to enable it to furnish to the city free water, for the many purposes stipulated, for a full period of thirty years, and at the same time the city operate a rival plant?

We submit that these questions carry their own answers, and that, as stated by the learned Judge, "It is hardly to be doubted that it was understood by both parties that the city would not engage in such an enterprise and in that way enter into direct competition with" appellant, and that no other reasonable or just interpretation could be placed upon this contract, in the light of the circumstances under which it was made.

The obligations of the parties to the contract of July 1, 1882, are correlative.

It is no answer to the interpretation of the contract of July 1, 1882, insisted upon by appellant, that the agreement or covenant to erect and **maintain** for a period of 30 years water works of sufficient capacity to supply the city and its inhabitants with water for fire protection, and public, sanitary and domestic purposes, is found among the agreements or covenants of the Water Company.

For what purpose were such works to be maintained? The inevitable answer from the contract itself is that they were to be maintained for the sole purpose of furnishing a sufficient supply of water to the city and its inhabitants for all purposes. Hence, we insist that, by necessary and inevitable implication, there arises out of the terms of said contract a correlative obligation on the part of the city, to do that which is necessary to enable the Water Company, so bound, as far as possible, to fulfill its part of the contract. Would it not be the limit of folly to suppose that the Water Company would or could maintain its plant for a period of thirty years, or for any lesser time, unless its water should be purchased by the City of Knoxville and its inhabitants? It is well settled that although a contract may in terms bind but one party, yet the law will imply corresponding and correlative obligations, when that is necessary to carry out the intention of the parties and prevent the contract from being ineffectual.

Churchward vs. Queen, L. R., 1 Q. B., 173.
Barton vs. McLean, 5 Hill, 256.

Or, as in the case of Manistee Iron Works Co. vs. Shores Lumber Co., 92 Wis., 21, the rule may be stated as follows:

> "It is a well known rule of law that every contract must be construed as if those terms which the law will imply were expressly introduced into it; that, where a contract is so framed that it binds the party contract-

ing to do the act, it will imply a correlative obligation on the other party to do what is necessary on his part to enable the party so contracting to fulfill his part of the contract."

Del. & Hudson Canal Co. vs. Penn. Coal Co., 8 Wall., 288.

The use of the word "exclusive" would have added nothing to the contract of July 1st, 1882.

It was earnestly argued in the Court below that the failure to expressly name the city in its second covenant (Rec., p. 37) whereby it obligated itself not to grant to any other person or corporation any contract or privilege to furnish water to the City of Knoxville, or its inhabitants, within the thirty year period and the absence of the term "exclusive" from the contract, is conclusive that it was not intended thereby to confer upon the Water Company the exclusive right or privilege of selling water to the city, or, to put it differently, that it was not intended to exclude the city during said period of thirty years from furnishing itself and its inhabitants with water.

We had not understood that there was so much magic in the word "exclusive." The city had not only provided for every municipal purpose, but had forced the Water Company to purchase and use in aid of that purpose the very property which the city had acquired and had intended to devote to that use. It had acquired the right to purchase the plant which in effect, as stated in the title of the contract, was constructed for it—it prohibited the company from assigning its contract or transferring its plant, and placed a limitation upon the encumbrances which might be lawfully placed thereon, so that when it became ready to assume the duty of furnishing a supply of water to itself and its inhabitants by the acquisition of the plant built for it and under its directions, it could exercise such power without embarrassment from innocent holders of large quantities of bonds. And not satisfied with all these indicia of practical ownership, the city, to give the fullest

credit to the Company in the erection of its plant, further agreed that it would not grant to any other person or corporation, any contract or privilege to furnish water to itself or its inhabitants during the continuance of said contract. We submit to Your Honors that this provision may be of no practical importance whatsoever, **except to place beyond doubt—to render the conclusion inevitable—that the city intended to exclude any possible idea that water could be furnished to the city and its inhabitants, during said thirty year period, by any person, company or corporation save appellant.** We say that it may be of no practical importance or benefit, save to indicate an exclusive right in appellant, because it is manifest that no individual or company, or other private corporation, could be found who would undertake to build and enter into competition with a water company in a town of ten or fifteen thousand inhabitants, where the plant and equipment already built and in operation was sufficient to supply the needs of the city and its inhabitants for water. Argument is not needed to demonstrate this proposition. Therefore we insist that it is manifest, taking all of the provisions of the contract and viewing them in the light, and from the situation, of the parties thereto when the same was executed, that it could not have been supposed by the parties thereto that the use of the term "exclusive" would have added anything whatsoever to the meaning, or strengthen the intention, of the parties.

Implied obligations must be enforced as well as those expressed.

It is a well settled fact that the law implies duties and obligations in a contract other than those which are expressed, and the implied duties and obligations are as much a part of the contract as those expressed. Or, to express it differently, what is implied in a statute, pleading or contract, is as much a part of it as what is expressed.

U. S. vs. Babbit, 1 Black, 55.
Massachusetts vs. Rhode Island, 12 Peters, 123.
Union Depot Co. vs. Chicago Ry. Co., 113 Mo., 213.

On this same point Mr. Parsons in his great work on Contracts (8th Ed), 515, says:

> "The law, as we have already had occasion to say in reference to various topics, frequently supplies by its implications, the want of express agreements between the parties. But it never overcomes by its implications the express provisions of parties. If these are illegal, the law avoids them. If they are legal, it yields to them, and does not put in their stead what it would have put by implication if the parties had been silent. The general ground of a legal implication is that the parties to the contract would have expressed that which the law implies, had they thought of it, or had they not supposed it was unnecessary to speak of it because the law provided for it. But where the parties do themselves make the express provision, the reason of the implication fails."

We insist that in this case we are not driven to the necessity of asking the court to imply a contract binding upon the city or obligating it not to construct works on its own account to compete with those of appellant. It is only necessary to enforce the plain, express provisions of this contract, and the fair, reasonable and even necessary legal implications therefrom. We only ask that the city be required to do in good faith what, as found by the Circuit Court, both parties distinctly understood was being agreed upon in said contract, and, in the language of the court in Los Angeles Water Co. vs. The City of Los Angeles, 103 Fed. Rep., 711:

> "It is occasionally well to recall the fact that there is no more reason to permit a municipal corporation to repudiate its solemn obligations, entered into for value, than there is to permit an individual to do so. Good faith and fair dealings should be exacted of the one equally with the other."

FEDERAL CASES BEARING UPON THE QUESTION.

This case, we again submit, is ruled by the decision of this court in Walla Walla Water Co. vs. Walla Walla, 172 U. S., 1. And because of its tremendous importance to appellant, the court will permit us again to call the attention of Your Honors to both the facts of the case and the holding of the court thereon:

The charter of the City of Walla Walla empowered it to erect and maintain water works, or to authorize the erection of the same, for the purpose of furnishing the city or the inhabitants thereof with a sufficient supply of water, and by another section the city was empowered to provide a sufficient supply of water and, "to grant to use the streets of the city for the purpose of laying gas and other pipes, to any person or association of persons for a term not exceeding twenty-five years: provided, always, that none of the rights or privileges shall be exclusive, nor prevent the city from granting the same rights to others." Under this statute the city by ordinance granted to the Water Company the right to lay and maintain water mains, etc., for twenty-five years, reserving to itself the right to maintain fire hydrants and to flush sewers during this term each without charge. The contract further provided that it was voidable by the city so far as it required the payment of money upon the judgment of a court of competent jurisdiction, when there should be a substantial failure of the supply of water, or failure of the company to perform its undertaking. The provisions of the ordinance were accepted by the water company and the works were erected, and the company for a number of years supplied the requisite water, and performed its contract. Then the city passed an ordinance to construct its own system of water works and to issue bonds therefor. Thereupon the Water Company filed its bill to enjoin the city. It is true that in that case the ordinance creating the contract be-

tween the city and the Water Company undertook to give the company the exclusive right to furnish water. And while it might seem on a casual reading of the opinion of the court that this fact had some influence on its judgment enjoining the city from becoming a competitor with the Water Company, yet a closer analysis of the opinion shows that this fact could not have been of controlling effect. Such a provision in the contract being in express violation of the grant under the state statute to the city, the statute read the provision out of the contract, and therefore the case necessarily was determined without regard to such provision. This case decides expressly that the subsequent ordinance of the city brought the case within the purview of that clause of Section 10, of Article 1, of the Federal Constitution, which prohibits a state from passing any law impairing the obligation of contracts. The municipality being an integral part of the state, its legislative act in the form of an ordinance, under an assumed authority from the state, operated upon the previous contract the same as if it had been a subsequent act of the State Legislature. The court said:

> "Had the privilege granted been an exclusive one the contract might be considered objectionable upon the ground that it is a monopoly, without an express sanction of the legislature to that effect."

It then further proceeded to hold:

> "That an ordinance granting the right to the Water Company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of the city with water, does not, in our opinion, create a monoply or prevent the granting of a similar franchise to another company."

And as conclusive proof that the court did not base its conclusion upon the provision of the contract giving the company the exclusive right for the designed period, the court said:

"There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that the city would not erect water works of its own, was accompanied, in Section 8 of the contract, with a reservation of a right to take, condemn and pay for the water works of the company at any time during the existence of the contract. Taking Sections 7 and 8 together, they amount simply to this, that if the city should desire to establish water works of its own, it would do so by condemning the property of the company, and making such changes in its plans, or such additions thereto, as it might deem desirable for the better supply of its inhabitants, but that it would not enter into a direct competition with the company during the life of the contract. **As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the city would carry out the contract in good faith.** An agreement of this kind was a natural incident to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any person or association of persons, for a term not exceeding twenty-five years. In establishing a system of water works the company would necessarily incur a large expense in the construction of the power house, and the laying of its pipes through the streets and as the life of the contract was limited to twenty-five years it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself,—a field in which it would undoubtedly have become the master,—and practically extinguish the rights it had already granted to the

company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking."

Walla Walla vs. Walla Walla Water Co., 172 U. S., 17.

This decision, as we understand the Court to have repeatedly said, is still the law of the land. It is recognized in every subsequent holding of this court upon the question. It was followed in the case of Vicksburg Water Company vs. City of Vicksburg, 185 U. S., 65-82, where the jurisdiction of this court was sustained to protect a contract similar to that involved in this case—a contract not stronger or clearer in meaning than the one at bar, although the term "exclusive" appeared therein.

The other cases wherein water companies were denied relief from municipal competition, are generally cases where no express, definite, contract providing a supply of water for a given period was involved, but where it was sought to raise a contract by implication from a mere grant of a franchise or right to do business within the municipality.

In the case of Stein vs. Water Company (1891), 141 U. S., 67, it was held that a right to take water from a particular source was not exclusive of other and different sources.

In Hamilton Gas Light & Coke Co. vs. City of Hamilton (1892), 146 U. S., 258, it was only decided: 1. That the contract between the city and the Gas Light Company had expired before the city undertook to build its own plant.

Note: In this case the contract will not expire until August 1, 1913.

2. That under the constitution of Ohio, the legislature had the right to amend the charter of the Water Company, so

as to repeal the exclusive character of the grant therein contained.

Note: There is no claim made in this case, nor could such a claim be made, that the charter of the Water Company has been in any manner repealed or amended. Under the constitution it could only be done by a general statute.

In Long Island Water Supply Co. vs. Brooklyn (1896), 166 U. S., 685, it was held that the exclusive right to supply a town with water, is not acquired by a water company organized under a statute which simply provides for the organization of such companies, when its contract with the town gives simply the privilege of laying its mains in the streets, and contained a covenant on the part of the town to pay certain hydrant rentals, without words of exclusion either express or by necessary implication.

In Bienville Water Supply Co. vs. Mobile (1899), 175 U. S., 109, the contention of the water company was decided against it on the ground that it did not claim an exclusive right —that the city had not contracted for it for the purpose of procuring a water supply for its inhabitants, and because the city was not refusing to comply with its contract to take water from said Bienville Company for purpose of fire protection.

In Bienville Water Supply Co. vs. Mobile (1901), 186 U. S., 212, between the same parties as in 175 U. S., 109, the contention was made by the water supply company that it did have an exclusive right, but the Supreme Court of the United States held against it on the ground that under the constitution of Alabama the Legislature itself, of that State, had no power to create a monopoly, or to confer an exclusive grant.

Note: But the Supreme Court of Tennessee, in the case of Memphis vs. Memphis Water Co., sustained an exclusive grant to the water company for a period

of twenty-five years, and held that such grant did not constitute a monopoly, nor was it in conflict with that provision of the constitution of Tennessee inhibiting grants in perpetuity.

City of Memphis vs. Memphis Water Co., 5 Heisk., 495, 530, 531.

The case of Skaneateles Water Co. vs. Skaneateles (1901), 184 U. S., 354, also presented an entirely different question from the one at bar, but the reasoning in that case, we submit, supports the contention of the appellant. In that case the municipality was authorized to supply itself and its inhabitants with water and had contracted with the water company for a supply of water to the village and its inhabitants for a period of five years. **After the expiration of this contract** the municipality saw fit to commence the erection of a municipal plant, and thereupon the water company sought to enjoin the city from building and erecting such plant.

Here we have a clear and palpable distinction between the facts of that case and those in the case at bar, in that the contract between complainant and defendant city is alive and does not expire until the first day of August, 1913. In that case it was contended that the municipality had by an election of methods estopped itself to build a municipal plant, but said Mr. Justice Peckham:

> "We can not see any solid foundation for the claim that there was a final and conclusive election of methods by the village, out of which sprang the implied contract, contended for, when the legislature **at that very time prohibited a contract for more than five years. It would seem in the nature of things that the election of methods was for no longer a time than the law permitted a contract to be made under the village.** After the expiration of that time we can not see why the parties were not in the same condition as to

> their respective rights than they were in before the contract for the five years was made. * * * **We can appreciate the argument that the village had no right to build and use its own plant during the running of the five years contract,** but we fail to see the force of the claim that, on account of once making a contract with complainant for five years, the village irrevocably bound itself by a contract never to build its own plant after the expiration of the term of said contract."

It is manifest that the decision in this case was based upon the ground that the contract had expired, and the irresistible conclusion from the reasoning of Mr. Justice Peckham, who spoke for the Court, is that during the period of said contract the municipality was by necessary implication concluded from building and erecting its own water plant.

In the case of Joplin vs. Southwestern Missouri Light Co., (1903), 191 U. S., 150, it was conceded by the Light Company that the city of Joplin had not exhausted its power to grant franchises or privileges in respect of lighting its streets, and that said city had full power to grant another franchise to any person other than the Light Company. Further, the Light Company did not claim that it had any exclusive right or privilege, or that the city had agreed to refrain from granting a light privilege to any other person; but the company contended that from the mere grant of a franchise is right to carry on its business in said city, a contract was implied in its favor; but this court, speaking through Mr. Justice McKenna, in substance, held that a contract will not be implied from the mere grant of a franchise or right to do business.

In Helena Water Works Co. vs. Helena (1904), 195 U. S., 383, it appeared that the period during which the water company was obligated to furnish water to the city was limited to the term of five years, which had expired long before the city

set about supplying its own works; and it further appeared that the ordinance upon which the water company based its right to an exclusive privilege contained a provision expressly declaring that the grant by the city to the water company should not be exclusive of the right of the city to contract with another company, so that the contention of the city had for its narrow support merely the grant of a franchise or right to carry on its business in the city, and therefore it was to be expected that following the repeated adjudications of this court, upon similar facts, the contention of the water company would be held unsound. In this case the decision of the Circuit Court of Appeals for the Ninth Circuit, was affirmed, and we therefore deem it proper to call the attention of this Honorable Court to that part of said opinion which fully covers the precise question before Your Honors. Speaking for the Court, Judge Morrow, among other things said:

> "We are further supported in this view of the ordinance by an examination of Section 6, where it is provided that the water company shall furnish and provide a full, ample, and sufficient supply of good, pure, wholesome, and clear water for the use and wants of the inhabitants of the city, and to provide the city with water for fire, sewerage (maintenance and construction), and other purposes, and that such supply shall be full, ample and sufficient for the present population of the city and for the future population of the city, as the same may be from time to time, 'during the full term of five years.' This section might properly be construed as a contract with the water company that the water company should have the exclusive right of supplying the city and its inhabitants with water during the first five years of the franchise. It might also be construed as an implied agreement that the city would not establish a plant of its own for the purpose of supplying water to its inhabitants or for its

> **own purposes during that period.** But this period of five years has long since expired, and the section now only serves to indicate that for the remaining 15 years of the franchise there was no exclusive franchise granted to the water company, and no implied agreement that during this last period it would not engage in the business of supplying water to the inhabitants of the city or for its own municipal purposes."
>
> **City of Helena vs. Helena Water Works Co., 122 Fed. Rep., 13.**

We next call the attention of Your Honors to the case of Cunningham vs. The City of Cleveland (C. C. A.), 98 Fed. Rep., 657-666, which we relied upon in the court below, but which is not noticed in the opinion of the court. In that case was involved, to some extent, the construction of a contract between the Cleveland Water & Electric Light Company and the City of Cleveland, a Tennessee municipal corporation, which was authorized to provide a supply of water for itself and its inhabitants, and grant privileges in respect thereof limited to 20 years. It is proper to observe that the charter of said water and light company was not granted under the Act of 1877, providing for the incorporation of water companies, and the exact terms and provisions of the contract between the parties are not set out in the opinion of the court. But it sufficiently appeared that the right to furnish water and lights to said city at certain stipulated prices had been granted, and the company was required to provide a designated number of hydrants and public lights, and as many more as the city might require. It was objected on behalf of the city that this contract secured to the company an exclusive privilege of furnishing water and light, and created a monopoly, which was beyond the power of the municipal board because not expressly conferred. Responding to this contention, Judge Taft, speaking for the Court, said:

> "The position is untenable. There is not one word in the contract forbidding the City of Cleveland from making exactly the same contract with another set of grantees. It is true that the city binds itself to use 40 public hydrants and 18 public lights; and it might at once, without the slightest infraction of the contract, agree to rent 40 other public hydrants and 18 other public lights from other persons or companies than the grantees of this franchise."

But in this case it is significant to note that Appellee City covenanted not to do the very thing for the lack of which Judge Taft reached the conclusion that the Water & Light Company did not have an exclusive privilege or monopoly. That is, in the contract before this Court, the city expressly obligated itself not to take water from any other person or corporation for itself or allow any other person or corporation to furnish water to its inhabitants during the full period of 30 years. Moreover, a complete answer to the contention made in the Cunningham case, is to be found in the decision of the Supreme Court of Tennessee in Memphis vs. Memphis Water Co., **supra,** wherein that court held that under the Tennessee constitution prohibiting monopolies, an exclusive grant limited to 25 years did not constitute a monopoly.

And in this connection we also call the attention of Your Honors to the holding of the Circuit Court of Appeals for the Sixth Circuit in Cunningham vs. The City of Cleveland, **supra,** that the City of Cleveland, under an authority no broader than that conferred upon the City of Knoxville, **had full power to contract for a supply of water for itself and its inhabitants arising out of its business and proprietary powers, and not in the exercise of its governmental and legislative functions;** that the distinction between such powers and functions is well marked, and that when the city, in virtue of its business or

proprietary powers entered into a contract which it was authorized to make, such contract is irrevocable.

Cunningham vs. Cleveland (C. C. A.), 98 Fed. Rep., 663.

Further, it seems to be well settled that while the action of municipal corporations is to be held strictly within the powers expressly or by necessary implication conferred upon it, yet within these limits they are to be favored by the courts. Powers expressly granted, or necessarily implied, are not to be defeated or impaired by a stringent construction.

Dill. Mun. Corp. (4th Ed.), Sec. 91, Note 2.
Smith vs. Madison, 7 Ind., 86.
Memphis vs. Adams, 9 Heisk. (Tenn.), 518.

In the case of City of Indianapolis vs. Indianapolis Gas Light & Coke Co., 66 Ind., 407, the Court said:

> "When it (a municipal corporation) makes a contract within the scope of its powers—not **ultra vires**—which is not against public policy, and not fraudulent, it must be enforced the same as the contract of a business corporation, or a person."

For these reasons we insist that no other reasonable or just interpretation can be placed upon the contract of July 1st, 1882, than that the city thereby contracted that during the life of said contract it would not enter into competition with appellant, and that the rights by said contract conferred upon appellant are, as held in the case of Troy Water Co. vs. Troy, 200 Pa. St., 430, entirely inconsistent with a reserved purpose on the part of the city authorities of Knoxville to render the investment of appellant absolutely worthless as soon as it might be completed, by the erection of water works of their own. This construction is not only just and reasonable, but it is the inevitable conclusion which must be placed upon the terms and pro-

visions of said contract, viewed in the light of the circumstances under which it was made.

White vs. Meadeville, 177 Pa. St., 643.

Memphis Gayoso Gas Co. vs. Williamson, 9 Heisk., 326.

This case is not referred to in the opinion of the court below. Although plainly distinguishable in its facts, as will be shown, the inevitable inference from the reasoning of the Supreme Court of Tennessee therein is to sustain the position of appellant in this case.

In that case, although instituted to recover damages for alleged malicious prosecution, it became necessary to determine whether the Memphis Gas Company, chartered by the Legislature of 1851, with all the rights, privileges, etc., which had been conferred upon the Nashville Gas Light Company, incorporated in 1849, had an exclusive right to manufacture gas for the City of Memphis and its inhabitants. The claim to an exclusive right rested mainly upon the third section of the Act of 1849, which is as follows:

> "Section 3. It shall be the duty of said company to establish within three years from the first day of January, 1850, a gas manufactory within the City of Nashville, of sufficient capacity to supply its corporate authorities and inhabitants with such public and private gas light as may be required."

By Section 5 the **privilege** was given to the company of erecting gas works and manufacturing and vending gas in the City of Memphis by means of public works, for the term of fifty years from and after the date of said act. **There was nothing in the act excluding other companies from the right to erect gas works or to sell gas in said city.** The court held that "the plain, obvious meaning of the legislature was to secure the establishment of gas works by the end of three years, of suffi-

cient capacity to supply the demand for gas light at that time." And that the two sections above referred to, construed together, mean that:

> "The company is **obliged** to have gas works completed at the end of three years sufficient to furnish all the gas that may be then required. If the duty thus imposed is discharged the obligation then ceases and from that time the company can go on to exercise the **privilege** granted for fifty years." (The blacks are by the court.)

So Your Honors will see that this wac a very different case in its facts, from the one at bar. If the contract between appellant and appellee city had merely provided that the company should erect and establish a system of water works sufficient to supply said city with water, and that such works should be completed within twelve months after the time stipulated, as provided in Section 8 of said contract (Rec., p. 35), then we concede that the probable construction of such contract would be that the company **had only obligated itself to build within twelve months a system of water works sufficient to furnish the city with water at that time.** But in addition to these provisions, the requirement is that the company shall construct works not only sufficient to supply said city with water for all the purposes stipulated in said contract, but shall **maintain said works** in **such condition as may be sufficient and necessary to enable it to comply with all the undertakings set forth in said contract for a period of thirty years.** It is to be noted that it is only under this covenant to **maintain** the water works for a period of thirty years in a condition necessary and sufficient to enable it to comply with its undertakings thereunder, that the Water Company, after having built within one year a plant in compliance with the plans furnished by the city, can be, and is, compelled, at all times within said period, to have

said plant in such condition as may be sufficient to meet the needs of the city and its inhabitants, for fire protection, public, sanitary and domestic purposes. If it were not for this requirement, could not the Water Company at any time discontinue the operation, or even dismantle, its plant?

San Antonio St. Ry. Co. vs. State, 99 Texas, 520.
Northern Pac. R. R. Co. vs. Washington, 152 U. S., 492.

But in addition to all this, as was not done in the case of the corporation whose charter was construed in the **Williamson** case, supra, the city covenanted that neither any person or corporation should have during said thirty year period any contract or privilege to furnish either the city or its inhabitants with water. And it was in construing these very provisions manifesting the plain, obvious meaning of the parties that appellant should have the sole right to furnish water to said city and its inhabitants for a period of thirty years, that this Court, in a case between appellant herein, as plaintiff in error, and appellee city herein, as defendant in error, 189 U. S., 435, said:

> "In the same year (referring to the date of the charter of appellant) 1882, the company made a contract with the city by which it agreed to construct its works and to furnish water, the city gave the company **exclusive privileges for thirty years and agreed to make certain payments**, etc., and it was mutually agreed, among other things, that, after fifteen years, the city should have the right to purchase the works at a price to be fixed by appraisers if not agreed upon."

Knoxville Water Co. vs. Knoxville, 189 U. S., 435.

Is the city not estopped to deny the exclusive character of appellant's rights even in the streets of the city for the limited period of thirty years?

ESTOPPEL IN PAIS.

It is plain that the intention of the parties was to make the rights of appellant, even in the streets of the city, exclusive for the period of thirty years; and that relying upon such rights and the good faith of the city, appellant was induced to build works for the benefit of the city and its inhabitants, at an outlay of several hundred thousands of dollars and its stocks and bonds were purchased by and are now held and owned by many innocent holders whose savings are invested therein, upon the faith and, as averred in the bill, with the distinct understanding, that the City of Knoxville would not, within the period of said contract, build works on its own account to compete with the plant and business of appellant. All this the city not only permitted, but procured to be done. There is no taint of fraud in the contract—and everything done thereunder, has been for the public good. Therefore, would it be any sufficient answer by appellee city to say that it has exceeded its charter powers in attempting to grant an exclusive right for a limited period in its streets, or in agreeing not to build on its own account, water works to compete with appellant? As said by Judge Dillon:

> "Municipal corporations, as we have seen, have, in some respects, a double character,—one public, the other (by way of distinction) private. As respects property not held for public use, or upon public trust, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes and be affected by them. For example, in an action on contract or for tort, a municipal corporation may plead or have

pleaded against it the statute of limitations. But such a corporation does not own, and can not alien, public streets or places, and no mere laches on its part, or on that of its officers, can defeat the public right thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public. It will perhaps be found that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be supported even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author can not assent to the doctrine that, as respect public rights, municipal corporations come impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle, but there is no danger of recognizing the principle of an **estoppel in pais** as applicable to exceptionable cases, since this leaves courts to decide the question, not by mere lapse of time, but upon all the circumstances of the case, to hold the public estopped or not, as right and justice may require."

2 Dill. Mun. Corp. (4th Ed.), Sec. 675.

We respectfully submit to Your Honors that it would be most difficult to conceive of a case wherein the facts would more strongly appeal to a court of equity, or where there could be private rights of more persuasive force to be protected against the public, than appear in the facts of this case.

This principle has been repeatedly recognized, and, citing the text, enforced in Tennessee:

In Dennis vs. Rainey, 8 Baxt., 501-4, it was cited approvingly in favor of a party who, under some claim of right had been in possession of and improved with full knowledge of the municipal authorities, a part of a public street.

In the City of Memphis vs. Looney, 9 Baxt., 129-135, it was cited approvingly where the statute of limitations had been pleaded against the enforcement of certain municipal taxes.

And in Sims vs. Chattanooga, 2 Lea, 695-700, it was also cited approvingly, but upon the particular facts of this case it was held that there was no estoppel in favor of the claimant of part of the public street.

In the case of Land Co. vs. Jellico, 103 Tenn., 320, the complaining Land Company sought to recover a certain sum of money for grading one of the streets of defendant, a municipal corporation, under a contract made for that purpose. The court held that the contract was invalid because entered into at a void special meeting of the City Council, but the defendant having permitted the work contemplated by the charter to be completed by complainant under the belief that all was satisfactory, the defendant city would not be heard to deny liability therefor.

In Gas Light Co. vs. Memphis, 93 Tenn., 612, it was held that a municipal corporation, although expressly restricted by its charter to contract in writing, and to create no general liability, was nevertheless liable, upon an implied contract, to pay for gas used for lighting its streets, because "the general law independent of express contract, imposes an obligation upon the city to do justice with respect to the same."

* Dill. on Mun. Corp. (4th Ed.), Sec. 460.

ESTOPPEL BY JUDGMENT.

We have endeavored to show that appellant and appellee were, by proper construction of their charters, fully authorized to enter into the contracts relied upon by appellant, and that under a proper interpretation of said contracts no other reasonable or just conclusion can be reached than thereby it was agreed that appellee would not construct and operate water works on its own account in competition with appellant during the continuance of said contracts; but in addition to all this we respectfully insist that these are no longer open ques-

tions, but have been adjudicated in favor of the contention here made by appellant. In support of this proposition we call the attention of Your Honors to the averments of the bill, showing that some three years after the plant of appellant had been built and put in operation under the contract of July 1, 1882, the city refused to pay the hydrant rentals accruing under said contract, whereupon suit was instituted by the Water Company to enforce said contract and collect the hydrant rentals thereunder. To this suit, it is averred in the bill, the City of Knoxville, "first interposed a plea which was overruled and thereupon * * * filed an answer in and by which it set out every possible defense that could be made, by able and ingenious counsel among which were a denial of the validity of the contract of July 1, 1882, and that appellant had complied therewith." This suit was instituted in and, upon the issue made and proof taken, determined in favor of the Water Company by the Chancery Court of Knox County; and thereupon an appeal was prayed and granted the city to the Supreme Court of the State, where the judgment and decree of the Chancery Court of Knox County was in all things affirmed. Whereupon a petition to rehear was filed, which was dismissed, on the ground "that there was no merit set up in the defense made by" the City of Knoxville, appellee herein. (Rec., pp. 6, 7.)

Therefore, we submit that upon and by the judgment of the Chancery Court of Knox County, in all things affirmed by the Supreme Court of the State of Tennessee, appellee herein is estopped to deny the validity of said contract, of July 1, 1882.

Further, the bill shows (Rec., p. 12) that in certain litigation between the City of Knoxville, appellee herein, and appellant, involving the right of said appellee to regulate the rates and charges of appellant for water furnished under said contract of July 1, 1882, and the various amendments thereto, appellant plead said contracts and claimed thereunder that it

was protected from regulation or further interference by the city in respect of its rates and charges; but while the Supreme Court of Tennessee (107 Tenn., 647), and this Honorable Court (189 U. S., 434), held that under the second section of the act providing for and authorizing appellant's charter, there was expressly reserved to the city the right to regulate the rates and charges of appellant for water, yet both courts recognized said contracts as binding, both upon appellant and appellee, and this court construed said contract of July 1, 1882, as giving to appellant the privilege and rights which it is seeking to enforce in this case.

It is true that in the litigation involving the right of the city to regulate the water rates and charges of appellant, the precise points upon which the city rests its contention in this case were not made; but in determining the question at issue between the parties it was necessary to consider and proper to construe the contracts.

The Supreme Court of Tennessee, without passing upon the exclusive character of the franchises, expressly recognized as valid agreements between the parties the several contracts exhibited with the bill in this cause.

Knoxville vs. Knoxville Water Company, 107 Tenn., 647.

This case came before Your Honors upon writ of error to the Supreme Court of Tennessee, and this Court, after stating that appellant was incorporated in 1882, to construct water works in or near Knoxville, with power to contract with the city and inhabitants for a supply of water, said:

> "In the year, 1882, the company made a contract with the city by which it agreed to construct its works and to furnish water, **the city gave the company exclusive privileges for 30 years,** and agreed to make certain payments, etc., and it was mutually agreed, among

other things, that after fifteen years the city would have the right to purchase the works at a price to be fixed by appraisers, if not agreed upon."

Knoxville Water Company vs. Knoxville, 189 U. S., 434, 435.

Therefore, we submit, and respectfully insist, that not only has the validity of the contracts between appellant and appellee been adjudged in a case wherein the validity of said contract was directly in issue, but that this court has held that the rights of appellant under said contract are exclusive for a period of thirty years, as herein contended.

Was the recognition of the contract of July 1, 1882, and the amendment thereto of October 20, 1899, by the Legislature, in Chapter 12 of the Acts of 1903, a ratification of said contract?

It is shown in the bill that the representatives of Knox County, including the City of Knoxville, in the General Assembly of Tennessee, offered and pressed for passage by said Assembly, a bill which was enacted into a law, and is known as Chapter 12 of the Acts of 1903.

Rec., pp. 13, 71, 74.

Said Act expressly recites that under and by virtue of said contract of July 1, 1882, and the amendment thereto of October 20, 1899, appellee city had the right to purchase all the property owned by appellant at a valuation to be fixed by an appraisement, and further reciting that appellee desired to take up said option and purchase said plant, authorized appellee to issue a sufficient amount of bonds to purchase the property of appellant as the same might be determined by an appraisement under the terms of said contract. We submit to Your Honors that even if by the strictest construction it could be held that appellant and appellee, were without author-

ity to enter into the contract of July 1, 1882, or that appellee was without authority to contract with appellant for its sole supply of water during a limited period, the recognition of said contract by the Legislature of Tennessee (Chapter 12 of the Acts of 1903), was sufficient to cure whatever lack of authority there might have been for said contract when the same was executed.

We apprehend that it will be admitted that if the Legislature had expressly authorized the making of said contracts in the first instance, the same would unquestionably be valid.

It is well settled that it is within the power of the legislature to give force and validity to any act where it has power to authorize in advance such act to be done.

Shields vs. Land Co., 94 Tenn., 123;
Butler vs. Tennessee, 97 Tenn., 679;
Commanche County vs. Lewis, 133 U. S., 198.

Following the cases just cited is the case of **Muse vs. Lexington, 110 Tenn., 655, 665, 666,** wherein the Supreme Court of Tennessee held that the implied legislative recognition of a municipal charter fatally defective and invalid on account of omissions, and failure to comply with the statutory requirements in the general law providing for the incorporation of municipal corporations, is as effectual to validate the charter as any direct legislation expressly validating the same could be. Now, applying this principle, we ask: Is not the recognition of the contract of July 1, 1882, by the Legislature of Tennessee, as above shown, as effectual to give life and validity to the same as an express declaration contained in the statute would have been?

We submit that the recognition of the Legislature was not confined to the right of the city to purchase the plant and property of appellant. The entire contract was recognized. The

rights of the Water Company and the city were, and are, correlative—the rights of the one depend upon the rights of the other. The Water Company was required to maintain its plant and property for a period of thirty years, unless within that time the city should desire to exercise the right reserved to it under said contract. This obligation to maintain the plant for thirty years, and the correlative obligation of appellee to take water from appellant during that time in order that the obligation of appellant might be effectuated, could only be terminated by the exercise of the right to purchase as provided in said contract. The act does not merely recite that the city has the right to purchase the plant and property of appellant, but expressly recognizes the contract itself, and the amendment thereto of October 20, 1899, which extended the right to purchase to all the property which the Water Company then owned, or might thereafter acquire, so as to exclude any possible claim that the right of purchase under the contract of July 1, 1882, was limited to the plant as it was originally built under that particular contract.

We further submit that the recognition of a contract, unless plainly limited, extends to every part thereof—and to the construction which the law places thereon—and it is manifest that the representatives of the City of Knoxville in the General Assembly, placed the same construction upon this contract as appellant does, therefore the city desired to terminate said contract and operate a plant on its own account, which it could only do by acquiring the property of appellant under and in the manner provided in the contract.

We submit if a mere recognition of an utterly void municipal charter by an Act of the Legislature, is sufficient to infuse life into such charter so as to supply a lack of power to encumber its property and that of its citizens with a large amount of bonds,—that the recognition given to the contract of July

1, 1882, by the Legislature of Tennessee, by Chapter 12 off the Acts of 1903, is as effectual a ratification of said contract as any direct legislation expressly validating the same would have been.

The contracts relied upon by appellant are protected by the Constitution of the United States.

In conclusion, we submit to Your Honors, upon the reasons hereinbefore stated, that Chapter 153 of the Acts of a General Assembly for the year 1903, and the doings of appellees thereunder as set out in the bill, violate the obligations off the several contracts between appellant and appellee city, and deprive appellant of its property without due process of law.

Walla Walla Water Co. vs. Walla Walla, 172 U. S., 1.
City of Los Angeles vs. Los Angeles Water Co., 177 U. S., 558.
Detroit vs. Railway Co., 184 U. S., 368.
Vicksburg Water Works vs. Vicksburg, 185 U. S., 65.
St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142.

Further, we submit, upon these authorities, that appellant has properly invoked the aid of a court of equity, and is entitled to the specific relief prayed in the bill, that is, that said Chapter 153 of the Acts of 1903 be declared void and appellees be restrained from constructing water works to be run in competition with appellant during the life and continuance of the contracts exhibited with the bill in this cause.

Respectfully submitted,

SAMUEL G. SHIELDS,
R. E. L. MOUNTCASTLE,
CHARLES T. CATES, JR.,
Solicitor for Appellant.

APPENDIX A.

References to statutes authorizing City of Knoxville to procure a water supply.

1. The City of Knoxville was incorporated by an act of the General Assembly passed October 27, 1815. While this act contains no express reference to a water supply, it was provided, among other things, that, "the corporation shall have full power and authority to enact and pass such laws and ordinances as may be necessary, **to preserve the general health,**" etc. * * * "and to pass all laws and ordinances necessary to carry the intent and meaning of this act into effect."

2. By an amendment to this act, passed January 19, 1838, the city was expressly authorized to borrow a sum of money not exceeding $50,000.00, for the purpose of erecting water works and supplying the city with water.

3. By another amendment of the charter of said city, passed December 7, 1866, the following provision was made:

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the Mayor and Aldermen of the City of Knoxville shall have and exercise all of the rights, powers, authorities and privileges which have heretofore been conferred by law upon the City of Nashville."

Thus, it is seen, that in addition to its former powers, the City of Knoxville had conferred upon it all of the rights, powers and privileges theretofore vested in and conferred upon the City of Nashville.

4. The City of Nashville was incorporated by an act passed January 31, 1848, found in the session Acts of 1847-1848, Chapter 68, pages 266-271. This act contained the following provisions bearing upon the question of a water supply:

Section 1, authorized the city, among other things, to "receive and hold property, real, and personal, beyond the limits of the city, to be used for the burial of the dead, for the erection

of water works, for the establishment of a hospital, for a poor house, work house, or house of correction * * * and to do all acts touching the same as natural persons," etc.

Section 6 of said act which, in 37 sub-sections, defines the powers of the city, provides, among other things, the following:

Sub-section 7. To make regulations **to secure the general health of the inhabitants,** and to prevent and remove nuisances.

Sub-section 8. **To provide the city with water, by water works, within or beyond the boundaries of the city.**

Sub-section 24. **To provide for the prevention and extinguishment of fires,** etc.

Sub-section 37. **To pass all ordinances not contrary to the constitution and laws of the State, that may be necessary to carry out the full intent and meaning of this act, and to accomplish the object of their incorporation.**

By Chapter 68 of the Session Acts of 1857-1858, Section 12 to 17 inclusive, the City of Nashville was given an additional charter; however, the principal purpose of this additional charter seems to have been, after re-enacting in Section 12, the substance of Section 1 of the act of 1847-1848, to make certain changes in the municipal legislature and the terms and the manner of electing municipal officers. This additional act contains nothing specially bearing upon the question, and need not be further noticed.

Such were the powers conferred upon the City of Knoxville by the act of 1866.

4. By an act passed June 10, 1885, being Chapter 8 of the session acts of the extra session of that year—and more than three years after the City of Knoxville and the Knoxville Water Company had entered into the contract of July 1, 1882—all the acts incorporating the City of Knoxville were compiled into one statute, and among other things, it was provided thereby:

By Section 2 of this act it was provided that the city "may purchase, receive and hold property, real and personal, within or beyond the limits of the city, to be used for the burial of the dead, for the erection of water works, work houses, houses of correction, hospitals or pest houses * * * and do all acts touching the same as natural persons," etc. This was re-enacting Section 1 of Chapter 68 of the Acts of 1847.

By Section 18 of said Act of 1885 it was provided that "The Mayor and Board of Aldermen shall have the following powers:

Sub-section 6. **To make regulations to secure the general health of the inhabitants,** and to prevent, declare and remove nuisances.

Sub-section 7. **To provide the city with water by water works within or beyond the boundaries of the city, or provide for supplying the city with water otherwise, and to provide for the prevention and extinguishing of fires, and to organize and establish fire companies.**

Thus it will be seen that Sub-section 6 of this Act was identical with Sub-section 7, above quoted of Section 6 of Chapter 68 of the Acts of 1847-1848; and that the provisions of Sub-sections 8 and 24 of Section 6 of the Act of 1847, were practically consolidated into Sub-section 7 of Section 18 of the Act of 1885.

Sub-section 29. To grant a right of way through the streets, avenues and squares of said city, for the purpose of street or other railroads, and for such other purposes as the Board of Aldermen may provide by ordinance; provided, that the Board of Aldermen shall not grant an exclusive right to the use of streets for any purpose, to any one person, company or corporation.

This sub-section contains the first express grant of power found in any of the acts incorporating the City of Knoxville to grant a right of way through its streets, either for street or

other railroads, or any other purpose. And in this connection it is proper to say that it is settled law in Tennessee that the power to grant to a public corporation a right of way or franchise in or over the streets of the city or other public thoroughfares, resides primarily in the legislature of the State, (Railroad vs. Adams. 3 Head, 597), and that at one time it was held (Railroad Co. vs. Memphis, 4 Cold., 415), that this power could not be delegated by the legislature to a municipality, but the right of the General Assembly to vest such power in the municipalities of the State is now recognized. (Citizens, etc., R. R. Co. vs. Africa, 110 Tenn., 83.)

But, as shown in the brief, there can be no doubt that the franchises of the Water Company, both its corporate franchises and its rights or easements in the streets, emanated directly from the State.

Sub-section 33. To take and appropriate, in the manner hereinafter provided, grounds adjacent to the corporation line, for water works purposes, site for pumping station, reservoir, upon the payment of damages.

6. The acts incorporating the towns of North and West Knoxville, which are now, respectively, the tenth and eleventh wards of the city, contain practically the same grant of powers as is contained in the charter of the City of Knoxville, enacted in 1885.

7. By an act passed January 29, 1903, approved February 2, 1903, and known as Chapter 12 of the Acts of 1903, the City of Knoxville was authorized to issue bonds to purchase and acquire the plant and property of the Knoxville Water Company, build extensions thereto and maintain and operate the same. This act is Exhibit No. 9 to the bill, and is found in the Record, pp. 71-74.

8. By Chapter 153 of the Acts of 1903, passed March 31, 1903, and approved April 3, 1903, the City of Knoxville was authorized to issue bonds, either to erect an independent plant, or, under certain conditions, purchase the property of the Knoxville Water Company. This act is Exhibit No. 10 to the bill in this cause, and is found in the record on pages 74-80.

APPENDIX B.

Acts of 1877, Chapter 104.

AN ACT to amend an Act entitled "An Act to provide for the organization of corporations," approved March 23, 1875, and grant charter to water companies.

Section 1. **Be it enacted by the General Assembly of the State of Tennessee,** That the form of charter for a water company shall be as follows: "State of Tennessee. Charter of Incorporation. Be it known, that (here insert the names of five or more persons not under twenty-one years of age) are hereby constituted a body politic and corporate by the name and style of (here insert the name of the Compa[illegible]). The general forms, etc., of said corporation are (here insert the general powers, etc., as directed in Section 5, Act March 23, 1875). The business of said company shall be to establish and construct water works in or near the town, city or village of (here insert the name), and it shall be the duty of said company to build, furnish and equip water works of sufficient capacity to furnish the corporate authorities and inhabitants of said town, city or village with water. To enable the company to establish such works they are hereby authorized and empowered to lay down pipes through the streets, lanes and alleys of said town, city or village, in such manner, however, as to produce the least possible inconvenience to the town, city or village, or its inhabitants, or to travelers, and to take up pavements and sidewalks; **Provided** they shall repair the same with the least possible delay. The company shall have power and are hereby authorized, to bring into the said town, city or village a sufficient supply of water by means of pipes or tanks, or in any other way, and to construct reservoirs for the reception thereof, and to supply with water the inhabitants of said town, city or village, and the environments thereof, and all who may be along the line of said companies' pipes, and of erecting hydrants or fire plugs within the said town, city or village, and to contract with said

inhabitants and with the corporate authorities of said town, city or village, or any incorporated companies, for the use of said water, and charge such price for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable rules and regulations respecting the use and waste of said water as the directors of said company may from time to time prescribe. The works and operations of said company shall be so constructed and managed that no annoyance shall accrue therefrom to the health and comfort of the inhabitants of said town, city or village, and nothing in this Act shall be so construed as to absolve the company, its officers or agents, from any legal proceedings to restrain or abate any nuisance arising from such water works or operations.

If any person or persons shall injure or destroy any portion of the water pipes or other property belonging to said company, or shall wilfully open a communication into the street or other water pipes, or let on water after it has been stopped by the company, such person or persons shall be liable for all damages sustained by such proceeding, and also a penalty not exceeding five hundred dollars, upon conviction before a court having jurisdiction of the offense. If any person or persons shall take or use any of the water of said company for domestic or other purposes without having previously contracted for the same with the officers of said company, such person or persons shall forfeit and pay to the said company the sum of fifty dollars, to be recovered before any Justice of the Peace in the same manner as other debts are collected by law: **Provided**, that nothing herein contained shall be construed to compel the inhabitants of said town, city or village to use the water so introduced by said company, or to prevent them from using water obtained in any other way. If any person or persons shall wilfully corrupt or permit anything to run into or fall into any stream or reservoir from which the said company shall take water to be introduced into said town, city or village,

which shall corrupt the same, or to render it unpalatable, unwholesome or unfit for domestic or manufacturing use, or for the supplying of stationary or locomotive engines, or shall bathe in any dam or reservoir, lead or enter any animal into the same, on being convicted thereof before any Justice of the Peace of the civil district in which said water is situated, shall pay a fine of not less than ten nor more than fifty dollars, one-half to the use of the informer, the other half to the use of said company, and shall moreover remain liable to said company for all damages.

Sec. 2. **Be it further enacted,** That such charter shall not be granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town or village, in which it is proposed to operate such water works, and such leave shall be certified by the Mayor or Recorder upon the application, and registered with it. And this Act is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company.

Sec. 3. **Be it further enacted,** That said Act approved March 23, 1875, be and the same is hereby further amended so that all corporations shall have obtained, or that may hereafter obtain charters under Section 11 of said Act of 1875, shall in addition to the powers specified in said Act, also have power to raise, buy, sell and deal in agricultural products, operate flouring and other mills, and deal in merchandise.

Sec. 4. **Be it further enacted,** That this Act take effect from and after its passage, the public welfare requiring it.

EDWIN T. TALIFERRO,
Speaker of the House of Representatives.

HUGH N. McADOO,
Speaker of the Senate.

Approved March 27, 1877.

JAS. D. PORTER, Governor.

APPENDIX C.

Form of Charter for Street Railroad Companies Provided by the General Incorporation Act of Tennessee, Chapter 142 of the Acts of 1875, Shannon's Code, Sections 2392 et seq.

2392. **Form of Charter.**—The form of a charter for a street railroad shall be as follows:

State of Tennessee.

Charter of Incorporation.

Be it known, That (here copy the names of fire or more corporators not under the age of twenty-one years) are hereby constituted a body politic and corporate, by the name and style of (here insert the name), for the purpose of constructing a street railroad in the incorporated town of (here insert the name of the town), commencing at (here insert the initial terminus) and ending at (here insert the terminus and the general route of the road).

2393. **Rights and powers of such incorporations.**—The general powers, etc., of said incorporators are (here insert the powers as declared in Sections 2054-2060). The said company is authorized to consummate any contract with the city authorities of the town aforesaid, or with the county court, if the route extends or is to be extended, beyond the limits of said incorporated city, or with private individuals necessary to get the right of way along the public streets of the city, or along the public roads of the county; **Provided,** That no one of the streets of said city shall be used by said company, nor shall any rails be laid down, until the consent of the city authorities has been first obtained, and an ordinance shall have been passed, prescribing the terms on which the same may be done; or, if the said road extends into the country, the consent of the county court must be first obtained.

The remaining portions of said act are not material to the question before the Court.

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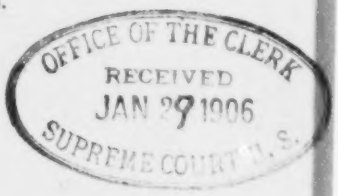
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.



No. 123.

KNOXVILLE WATER COMPANY, APPELLANT,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE ET AL.

PETITION FOR A REHEARING.

SAMUEL G. SHIELDS,
R. E. L. MOUNTCASTLE,
CHARLES T. CATES, JR.,
Solicitors for Appellants and Petitioners.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20039

(19,533.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

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vs.

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE ET AL., APPELLEES.

PETITION FOR A REHEARING.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court:

Now comes the appellant, Knoxville Water Company, and, respectfully showing that it is aggrieved by the opinion and judgment of this court filed and entered herein, petitions this honorable court for a rehearing of this cause, or for a modification of said opinion and judgment, for the following reasons:

FIRST.

The court, we respectfully submit, failed to distinguish the manifest object and purpose of the contract of July 1, 1882 (Rec., pp. 34-40), and the respective rights and obliga-

tions of appellant and appellee City of Knoxville thereunder, from an ordinary statute creating a corporation, or a statute or ordinance merely granting a franchise or license to carry on a particular business, and erroneously applied to a solemn contract, entered into within the powers of both parties, those principles or canons of construction governing the interpretation of doubtful grants of public property, or of those powers and functions necessary for the accomplishment of the ends of government.

SECOND.

In construing the contract of July 1, 1882 (Rec., pp. 34-40), the court only discussed or, may we respectfully submit, considered (opinion, pp. 7-8) that provision of the contract whereby the city covenanted (Rec., p. 27) "not to grant to any other person or corporation any contract, or privilege to furnish water to the City of Knoxville, or the privilege of erecting upon the public streets, lanes or alleys or other public grounds, for the purpose of furnishing said city or its inhabitants with water, for the full period of thirty years from the first day of August, 1883," and erroneously construing the averments of the bill, particularly the first and fourth paragraphs thereof, failed to give effect not only to the situation of the parties at the time the contract was entered into, but also those express provisions of the contract which could mean nothing else than that appellant should furnish to appellee city and its inhabitants, and that they would take from appellant, all the water required by them for fire protection, public sanitary and domestic purposes during the full period of thirty years, unless sooner the city should purchase the plant of appellant.

In support whereof we, among other matters hereinafter referred to, submit:

1st. The charter of the Knoxville Water Company was not granted in 1877, as stated on the first page of the opinion, but in 1882 (Rec., p. 31), as shown in Exhibit No. 1, referred to in the first paragraph of the bill and set out in the record between pages 28 and 31. (See certificate Secretary of State, Rec., p. 31.)

Therefore, whatever inference the court may have drawn from its misconstruction or misunderstanding in respect of the date on which the charter of appellant was granted, to the effect that it had been carrying on its business in Knoxville for some time prior to the execution of the contract of July 1, 1882, is not warranted by the fact; and, moreover, the bill specifically avers that the plant and property of appellant were built under said contract of July 1, 1882.

2d. The abandonment by the city of its plan to build its own plant, which had been actually begun, did not occur, as the court seems to have found (opinion, p. 8), prior to and independent of the contract of July 1, 1882, but was only consummated as an integral part of that contract—in fact, the efforts of the city toward establishing a municipal plant became merged into said contract—by which appellee city secured the completion of the work commenced by it according to its own plans and specifications, coupled with provisions to enable it to secure the plant at a fair valuation, and rendering it impossible for appellant to sell to any other corporation, company, or individual (Rec., pp. 4, 5, 34, 39).

3d. The Water Company was required not only to build a system of "water works for the City of Knoxville" of capacity sufficient (Rec., p. 34) to supply said city with water for every purpose to which a municipal plant could be devoted, viz., "fire protection, public sanitary and domestic purposes," but to maintain said plant in such condition as would be sufficient and necessary to answer all of said purposes for the full period of thirty years, unless the city should become the owner of the same under its reserved right of purchase; and in this connection it is important to bear in mind, as throwing light upon the intention of the parties at the time, and showing the merger of the plans and efforts of the city into the contract of July 1, 1882, and that in fact the plant built thereunder was to all intents and purposes a municipal plant, the Water Company was required to take and use in and as a part of said plant, the particular property which the city had purchased for pumping station and reservoir sites (Rec., pp. 4, 5, 34).

THIRD.

The court should have treated the contract of July 1, 1882, as a valid and continuing agreement made by the city in virtue of its business powers, whereby it secured for itself during a limited period a continuing and certain supply of a commodity necessary, not only to its inhabitants, but to itself, for fire protection and sanitary purposes.

By said contract the city merely purchased water as it would purchase coal or sewer pipe, and thereby it did not "diminish its power of accomplishing the ends of its creation," but fulfilled those ends, and without divesting itself of any governmental function, purchased a necessary and

useful commodity for itself and inhabitants, the price of which at all times it may control, within reasonable limits, under the very charter of appellant Water Company.

FOURTH.

Appellant is either entitled to restrain appellee city from building an independent competing plant, or to compensation for the result of such independent and competitive plant, which, in the very nature of things, will result in the "taking" and destruction of appellant's plant and business. These principles are enunciated and enforced both by this court and the supreme court of Tennessee in the Walla Walla case (172 U. S., 1) and Red River Bridge Co. *vs.* Clarksville, 1st Sneed (Tenn.), 176, where contracts were enforced and protected without regard to their exclusive character.

FIFTH.

If the court should be of the opinion that appellant is not entitled to the relief sought by it in the courts of the United States, then, for reasons set out in the brief made a part of this petition, the bill should be dismissed without prejudice.

Further, your petitioner prays:

1st. That an order may be made for rehearing of the arguments in this cause on a day to be appointed by the court, at such time and upon such points as the court may direct.

2d. If, in the opinion of the court, your petitioner is not entitled to a rehearing of the argument on the merits, as prayed above, then it prays for a rehearing to the extent

that the opinion and judgment of the court may be modified, so that the dismissal of its bill may be without prejudice, and so petitioner will ever pray.

KNOXVILLE WATER COMPANY,
By SAMUEL G. SHIELDS,
R. E. L. MOUNTCASTLE,
CHARLES T. CATES, JR., *Attorneys.*

We hereby certify that this petition for rehearing is presented in good faith, and that we believe it is based on meritorious grounds.

SAMUEL G. SHIELDS,
R. E. L. MOUNTCASTLE,
CHARLES T. CATES, JR.,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION.

FIRST.

In support of the petition to rehear it is respectfully submitted:

1. The contract of July 1, 1882, is merely an agreement on the part of the city arising out of its business or proprietary powers, as distinguished from its governmental or legislative functions. By said contract the city neither granted a franchise nor parted with or diminished any of the powers necessary to accomplish the ends of its creation, but continued vested with absolute control over the price or cost of the commodity secured by said contract under the power of regulation expressly conferred upon it in the charter of the Water Company.

After a careful study of the opinion of the court we respectfully submit that the court has confused the subject-matter of said contract—its sole purpose—with the powers already granted to and vested in the Water Company, not by the city through and under said contract, but by the State through its charter prior to and independent of, though leading up to, said contract. Note the situation. The charter of the Water Company was granted on January 4, 1882, after consent of the city had been endorsed upon its application (Rec., p. 31), and immediately the Water Company was created into a corporation and vested not only with the usual and ordinary powers necessary to the operation of a water plant, but specially vested with the right or franchise to enter upon and occupy all of the streets, lanes, and public

thoroughfares of the city. It was also clothed with power to make any and all contracts with the city or its inhabitants covering a supply of water to them (Rec., p. 29).

How was it with the city? As shown in our original brief (pp. 24 to 27, 68 to 70), and as specifically averred in the bill (Rec., p. 4), the city was clothed with power and authority to provide a supply of water for itself and its inhabitants.

Thus, while both parties had the right to contract with each other, and the city might by contract secure a supply of water from the Knoxville Water Co. or refuse to do so, as to it seemed best, it could not prevent the Water Company from entering upon its streets and public thoroughfares for the purpose of establishing and maintaining a water plant, because such power was expressly conferred upon the Water Company by its charter. Therefore there was no grant by said contract of any franchise to the Water Company in the sense of a grant of public property or governmental or legislative functions.

The contract may be boiled down to this: An obligation upon the part of the Water Company to furnish for a period of thirty years all the water which the city might require for itself or its inhabitants, and a correlative obligation upon the part of the city to take such water in order to enable the Water Company to fulfill its covenants and undertakings.

Such contract, as substantially held by the court of appeals for the sixth circuit, speaking through Judge Taft, and passing upon a similar question between a Tennessee corporation and a municipality of the same State, arose out of the business powers of the city as distinguished from its governmental or legislative functions. That the distinction

between such powers and functions and the rules of interpretation applicable thereto is well marked—that is, contracts entered into under and within the business powers of a corporation—should receive the same treatment and be subjected to the same rules of interpretation as contracts between private corporations or individuals (Cunningham *vs.* Cleveland (C. C. A.), 98 Fed. Rep., 663; Illinois Trust & Savings Bank *vs.* Arkansas City (C. C. A.), 76 Fed. Rep., 271; Western Savings Fund Association *vs.* Philadelphia, 31 Pa. St., 175).

We respectfully insist that it is well settled by the decisions of this court and the weight of authority in other jurisdictions that when a municipal corporation makes a contract within the scope of its just powers—which is not against public policy and not fraudulent—it must be construed and enforced as the contract of a business corporation or person. Such was practically the language of the supreme court of Indiana in the case of The City of Indianapolis *vs.* Indianapolis Gas Light & Coke Co., 66 Ind., 407.

Full effect was given to this principle by this court in the case of Hall *vs.* Wisconsin, 103 U. S., 5, 10, 11, wherein it was held that a contract between a State and an individual, whereby the latter is to perform certain services for a specific period at a stipulated compensation, is within the protection of the Constitution, and even a repeal of the acts pursuant to which the contract was made before the expiration of the term cannot deprive him of his compensation for the full period. In *Davis vs. Gray,* 16 *Wall.,* 203, 232, involving the construction of a grant to a large tract of the public domain, this court said:

"When a State descends from the plane of its sovereignty "and contract with a private person, it is regarded pro hac "vice as a private person itself and is treated accordingly."

Therefore we submit that in construing the force and effect to be given to the contract of July 1, 1882, it should be treated not as merely conferring a license or franchise to do business or granting away powers, diminishing the usefulness or destroying the purposes for which the municipality was created, but as an ordinary agreement for the benefit of the municipality and its citizens, whereby was secured a commodity no more necessary for fire protection and sanitary purposes than would be fuel for its fire-engines or piping for its sewers. The question of whether the parties would trade—that is, one would sell and the other would buy—was a mere matter of agreement entered into within the just powers of both parties, and we submit that no rule of construction should apply different from that applying to any valid and enforceable contract covering a like subject-matter between private corporations or individuals.

2. In further support of the proposition relied on in the first paragraph of the petition for rehearing we respectfully submit that the rule of construction applied and enforced, in the opinion of this court, is applicable alone to grants of public property or of those governmental functions and powers, which, as stated by this court in the Charles River Bridge case (11 Pet., 420), must not be diminished so as to defeat the accomplishment of the ends for which government is created; and we fail to remember a case decided either by this court or any other where it was applied save to cases wherein it was sought to *imply a contract* from a mere license

or grant to carry on a particular business or to similar cases. In so far as our researches go, it has never been applied so as to defeat the purpose and object of a valid contract entered into within the powers of the parties thereto.

To illustrate our meaning, it is only necessary for us to analyze the holding of this court and the matters to which it was applicable in the Charles River Bridge case, *supra*, which by all the cases is cited as the fountain and source of that particular canon of construction enforced against appellant in this case. In that case it was contended on behalf of the Charles River Bridge Co. that its charter was a contract giving it exclusive right to build a bridge across the Charles river, which was impaired by a subsequent grant to the Warren Bridge Co., authorizing it to erect a bridge across the same river. Prior to the grant to the Charles River Bridge Co.—that is, in 1650—Harvard college had been granted ferry rights across said river, and in the charter of the Charles River Co. it was made obligatory upon that company to pay to Harvard college £200 annually *out of the tolls* received from said bridge. In addition to its own charter, the Charles River Company sought and set up a claim to an exclusive franchise through the grant to Harvard college; but after an exhaustive argument by some of the greatest lawyers and ablest jurists that this country has produced, this court held:

1st. That the ferry rights granted to Harvard college in 1650 were extinguished by the building of the Charles River bridge and the compensation of £200 per annum provided to be paid and accepted by said college *out of the tolls* received from said bridge.

2d. The act incorporating the Charles River Bridge Co. conferred only the privileges such as are commonly given to corporations of that kind—that is, provisions authorizing it to build a bridge and to establish certain rates of toll. This was the whole grant. No exclusive right over the waters of the river was given—no right to erect another bridge or prevent others from doing so was conferred, nor was there any promise or engagement upon the part of the State that other bridges should not be erected.

3d. Upon these facts the court refused to *imply a contract* or infer one from the mere grant of franchises contained in this ordinary act of incorporation, and we respectfully submit that every case cited in the opinion of the court involves facts either similar to the Charles River Bridge case, where no contract was executed, and the court refused to imply one from a mere grant to do business, or where the contract had expired by limitation or had been made subject to the authority of the State to revoke the same.

In Turnpike *vs.* Illinois (96 U. S., 63–68) the general principle announced in the Charles River Bridge case was approved, but another well-settled rule was equally controlling in the determination reached by this court. In this case the original grant limited the franchise to twenty-five years. In 1861, when the term of the charter had more than half expired, the State gave the company a new and additional privilege, the privilege of using a certain public bridge and dike and of erecting a toll-gate thereon. Said the court:

"The only consideration required was that the company should keep them in repair, but should not even be responsible for any destruction of the dike by flood."

Here the absence of an agreement to *maintain* the dike was specially noticed by the court.

Further, "the consideration was continuous and correlative to the continued use. No term was expressed for the enjoyment of this privilege, and no conditions were imposed for resuming or revoking it on the part of the State. It cannot be presumed that it was intended for a perpetual grant, for the corporation itself had but a limited period of existence."

"By analogy to the rule of the common law, that a grant to a natural person, without words of inheritance, creates only an estate for his life, a grant, without words of perpetuity, to a corporation aggregate, whose duration is limited, creates only an estate for its life."

Thereupon it was held that the use of the bridge and dike terminated with the corporate existence of the corporation.

In Oregon Railway & Navigation Co. *vs.* Oregonian Railway Co., Limited (130 U. S., 126), the rule was applied not to the construction of a contract, but to the charter or articles of incorporation upon which the very existence of the corporation depended.

In Coosaw Mining Co. *vs.* South Carolina (144 U. S., 550, 561–2) the quotation from the opinion was applied to the construction of a grant of public property which was fairly susceptible of two different meanings or interpretations.

In Slidell *vs.* Grandjean (111 U. S., 412, 438) the principle enforced in the opinion was applied not to a contract in any way similar to the one involved at bar, but to a grant of a large part of the public domain practically without consideration.

So in Hamilton Gas Light Co. *vs.* Hamilton City (145 U. S., 258), while the principle was recognized, it was not applied to a valid, existing, and enforceable contract, and this court so only decided:

1. That the contract between the city and the Gas Light Company had expired before the city undertook to build its own plant.

2. That whatever may have been the exclusive character of the original grant to the Gas Company, nevertheless that grant was subject to the provisions of the constitution of Ohio relating to the amendment or repeal of charters of incorporation, and that such constitutional right had been exercised through a proper legislative enactment, by which the exclusive character of the grant was repealed. It is to be noted that there is no claim in this case, nor could such a claim be made, that the charter of the Water Company has been in any manner repealed or amended. Under the constitution of Tennessee that could only be done by statute.

The Stein case (141 U. S., 67–81) is only authority for the proposition that the right to take water from one particular source is not exclusive of other and different sources.

In the Joplin case (191 U. S., 150–156) it is specifically stated that the Light Company made no claim to an exclusive franchise; but its contention was that a contract was to be implied from the mere grant of a right to do business during a certain period. Confessedly, said contention was properly overruled.

We confess that we are wholly unable to find anything in the Helena case (195 U. S., 383) which militates against the contention made here on behalf of appellant. In that case

the period during which the Water Company had obligated itself to furnish water to the city was limited to a term of five years, and had expired before the city set about building its own works; and in addition to this the ordinance upon which the Water Company based its claim to an exclusive privilege contained an express provision declaring that the grant by the city to the Water Company should not be exclusive of the right of the city to contract with another company, so that the contention of the city had for its narrow support merely the grant of a franchise or right to carry on its business in the city.

At the risk of repetition, we respectfully but earnestly invoke the attention of your honors to the opinion of the circuit court of appeals, ninth circuit, when the Helena case was before it, and whose judgment was affirmed by this court (City of Helena *vs.* Helena Water Works Co., 122 Fed. Rep., 13).

Therefore, after most careful consideration of this whole question, we feel constrained to respectfully but earnestly submit that this contract which is entered into between these two parties, and which upon the averment of bill must be held to have been and to be for the public good, when viewed from the situation of the parties and in the light of the surrounding circumstances, meets every objection or ground upon which this court has hitherto repelled any individual or corporation claiming an exclusive right, privilege, or franchise.

SECOND.

But without regard to whether the principle applied and enforced by the majority of the court as set out in the opinion is applicable to the contract involved in this case, nevertheless we confidently submit that, even judged by that strict rule of construction, the court should have determined that the city had thereby precluded itself from obtaining a supply of water for itself and its inhabitants from any other source save the Knoxville Water Company during a period of thirty years, unless within that time the city exercised its reserved right to purchase the plant and property of appellant, and thus put an end to its obligation to further use or take water from appellant.

We cannot suppose that the court by its opinion and the language therein used intended to extend the principle of strict construction beyond a case where a grant or ordinance or contract was susceptible of two or more constructions, in which event that construction most favorable to the public would be adopted. We do not understand that by the use of the term "Nothing passes by mere implication" the court intended to say more than that doubts will be resolved in favor of the public, or that there must be something more than a bare implication or inference upon which to predicate a claim to an inviolable grant either of property or franchise. Certainly the court could not have meant that nothing will pass by implication, however strong and inevitable such implication may be, because it is well settled that a municipal corporation possesses not only those powers expressly granted, *but such as are necessarily or fairly implied in or incident to the purposes granted,* and that where there

is any fair doubt concerning the existence of power such doubt is to be resolved against the corporation. Nevertheless it is equally well settled that the fundamental and universal rule, which is as reasonable as it is necessary, is that the construction to be placed upon a legislative grant is to be just, seeking first of all for the legislative intent in order to give it fair effect.

Dill. Mun. Corp. (4th Ed.), secs. 89, 91.

In Tennessee, and it must be borne in mind that the rights, powers, and obligations of Tennessee corporations are here involved, the rule is thus stated:

"A corporation exists alone by virtue of its act of incorporation and it can exercise no powers but such as are the result of necessary or proper implication. The powers of a corporation being exercised, then, under delegated authority, are to be strictly construed. * * * *But this construction has never confined the execution of the power to the word and letter, but everything necessary and proper for carrying into execution the granted powers has always been conceded by the strictest constructionists.*"

Nichol *vs.* Nashville, 9 Humph., 261–2.

City of Memphis *vs.* Memphis Gayoso Gas Co., 9 Heisk., 530, 537, 538.

Further, this court in Hudson Canal Co. *vs.* Penna. Coal Co., 8th Wall., 288, in effect said that necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed.

It is further well settled that the law implies duties and obligations in a contract other than those which are expressed, or, to state it differently, what is implied in a statute,

pleading, or contract is as much a part of it as what is expressed.

U. S. *vs.* Babbit, 1 Black, 55.
Donahue *vs.* Kittell, 1 Cliff., 144.
Mass. *vs.* R. I., 12 Peters, 123.
Union Depot Co. *vs.* Chicago Ry. Co., 193 Mo., 213.
Parsons on Contracts (9th Ed.), vol. 2, p. 670.

Further, we submit that in determining the meaning of a contract courts cannot be blind to the situation of the parties and what has been done by both parties under the contract, but must acquaint themselves with the situation of the persons and the circumstances surrounding them, and, thus placing themselves in the situation of the parties, view the circumstances in the light of the surroundings, so as to judge of the meaning of the words and of the correct application of the language to the thing described.

Goddard *vs.* Foster, 11 Wall., 123, 143.
Guarantee Co. *vs.* Trust Co. (C. C. A.), 80 Fed, 766, 778.

The situation of the parties in 1882 and immediately preceding, and at the time of the execution of the contract of July 1, 1882, may upon the averments in the bill be best shown as though the following conversation had taken place between them leading up to and resulting in the execution of a contract:

The Water Company.—We have just been granted a charter of incorporation by the State, authorizing us to carry on the business of a water company in the City of Knoxville, and to that end empowering us to enter upon and

use the streets and public thoroughfares of the city, but if we should avail ourselves of the powers thus granted us and you (the city) should continue and complete the building of a plant to furnish yourselves and inhabitants with water, we would perhaps have no customers. Do you think it for your best interests to carry out your present plan?

The City.—It is true that a supply of water for municipal and private purposes is necessary both for the public and general good, and for that reason we have for some time been engaged in making plans and acquiring property for the purpose of erecting a plant, which we have just commenced, but there may be some doubt about the wisdom of this undertaking, in view of existing conditions. Therefore we might be induced to give over and abandon our plans and not complete the plant under construction, provided satisfactory terms can be made either with you (the Knoxville Water Company) or some other corporation or individual, by which a sufficient plant shall be erected which may become ours if hereafter we determine that we would like to end the taking of our supply from you, and which we may do by taking over and acquiring your property at its fair valuation. We shall advertise for bids, and we are ready to deal with that company or individual who, upon terms most favorable to us, will build our plant, and in doing so take, use, and pay for the property which we have acquired for that purpose, and keep and maintain it in a position to supply all public, municipal, and general private purposes, until such time as we desire to take over the plant for ourselves, and in the meantime, in order to prevent its acquisition by any other party, our right to purchase must be expressly stipulated, as well as a refusal to sell the plant and property to any one else.

The Water Company.—The terms you propose are satisfactory to us. We will build a plant for the City of Knoxville of capacity sufficient to supply all of its needs.

Thereupon they proceeded to set down what each desired. First they entitled their contract, *Articles of Agreement for the Construction of Water Works for the City of Knoxville.* Then the Water Company was required to agree to erect and establish a system of water works upon the property theretofore acquired by the city for that purpose and in accordance with plans and specifications prepared by or for the city, of capacity sufficient to supply the city with water for fire protection and for public, sanitary, and domestic purposes, and to have this plant completed within twelve months. Not content with this, the city says: You must also agree not only to erect a designated number of fire-hydrants, but also to erect from time to time as many additional hydrants as the necessity of the city may require. And still, not content with this, required the company to obligate itself to maintain its plant in such condition as would be sufficient and necessary to enable it to comply with all of its undertakings for a full period of thirty years, unless within that time the city should terminate the contract by the purchase of said plant, which was at all times the *prime and controlling idea of the city dominating every and all other provisions.*

Now, what is the necessary, the inevitable effect of these provisions? It is well settled that although a contract may in terms bind but one party, yet the law will imply corresponding and correlative obligations when it is necessary to carry out the intent of the parties and prevent the contract from being ineffectual.

Or, as in the case of Manistee Iron Works Co. *vs.* Shores

Lumber Co., 92 Wis., 21, which was predicated upon the language of Mr. Justice Clifford in D. & H. Canal Co. *vs.* Penn. Coal Co., 8 Wall., 289, the rule may be stated as follows:

"It is a well-known rule of law that every contract must be construed as if those terms which the law will imply were expressly introduced into it; that, where a contract is so framed that it binds the party contracting to do the act, it will imply a correlative obligation on the other party to do what is necessary on his part to enable the party so contracting to fulfill his part of the contract."

In Churchwood *vs.* Regina, L. R., 1 Q. B., 173, 198, Chief Justice Cockburn said:

"If a man engaged to work and render service which necessitates great outlay of money, time and trouble, and he is only to be paid by the measure of the work performed, the contract necessarily presupposes and implies on the part of the person who engages him an obligation to supply the work; so when there is an engagement to manufacture some article, a corresponding obligation on the other party is implied to take it, for otherwise it would be impossible the party bestowing his service could claim remuneration."

This doctrine was approved by Mr. Justice Clifford in D. & H. Canal Co. *vs.* Penna. Coal Co., 8 Wall., 289, where, among other things, he said:

"Undoubtedly necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed."

Now, applying these principles to this contract, what do we find? An express obligation upon the part of the Water

Company to build a plant sufficient to furnish, and to furnish, all of the water needed by the city and its inhabitants for all purposes for a full period of thirty years, and to maintain said plant so as to be able to comply with and fulfill said obligation.

Even if we could disregard or close our eyes to the situation of the parties at the time and to the fact that to all the intents and purposes this plant was built for the city itself, we could not by any refinement of construction escape the inevitable conclusion that during the period which the Water Company was required to furnish water to the city and its inhabitants and to keep up this plant so as to respond to every municipal or general private demand, that without regard to the nature of its franchise or the terms applicable to this particular thing, yet this could mean nothing else but that the city must during this period take and use the water of appellant so as to enable it to fulfill and comply with its obligations.

Let us illustrate this. It is plainly provided (Rec., pp. 34, 35) that the Water Company must so extend its pipes and mains that it may be in a position to erect as many fire-hydrants as the necessity of the city may require. How unjust and, we may be pardoned for submitting, what folly it would have been for the parties to even dream that the Water Company should be required to lay down pipes necessary to support some 600 or 700 hydrants, when the city would only take a third of that number. Yet this is exactly the present situation. The city has only required the Water Company to erect 250 hydrants. The pipes and mains of the Water Company are sufficient to support all the hydrants which the necessities of the city may require (Rec., p. 21).

Nevertheless, the city, disregarding this provision of the contract, is making arrangement to erect in addition to the 250 now in use by it 575 additional hydrants upon pipes and mains built for itself. The fact that it is going to erect this number of hydrants may be *prima facie* evidence that they are necessary, but certainly the city, in view of the plain requirements of the contract, ought not to be permitted to compel the Water Company to maintain miles of pipes and mains sufficient to supply 575 hydrants without having the income therefrom. The Water Company has the pipes and mains necessary and sufficient to support these hydrants. Upon the plainest principles of justice and equity it is entitled to this revenue, and the city should not be permitted to act in competition with and tax and destroy the plant and property of the Water Company, when it is complying in the fullest sense with both the letter and spirit of its contract.

Further, we respectfully submit that the majority of the court in discussing only that provision of the contract whereby the city covenanted not to grant to any other person or corporation the right or privilege of supplying itself with water, and apparently ignoring the other provisions hereinbefore referred to, seems to have been of the opinion that the right of the Water Company to continue supplying water to the city and its inhabitants as their sole and only supply depends solely upon that particular covenant upon the part of the city. We respectfully submit that such is not the case. It can only be useful as rounding out and finishing off a contract, whose exclusive character must break out upon even the most casual reader thereof. That provision, we submit, was as much in the interest of the city as the Water Company and after the other provisions had been placed in the con-

tract, the Water Company doubtless said something like this to the city:

Now it is true that you are to take from us all the water required by you until you become ready to buy our plant; now there is nothing in this which inhibits your giving consent to the State's granting another charter, authorizing some other corporation to enter this territory and build a plant. True, competition from a private company may not be greatly feared; nevertheless, it would be embarrassing, not only to us, but to you when you come to own this plant under your reserved right of purchase. Therefore, let us put this matter beyond question by a stipulation to the effect that you will not give any other person or corporation the right to furnish either yourself or the inhabitants of the city with water.

That was done; that rounded out the contract. We submit that unless it shall be held by this court that in order to protect a water company in a sole right to supply a city and its inhabitants with water it is necessary to expressly stipulate that such right is exclusive; that it would be impossible to frame a contract in stronger language containing more inevitable implications as to the exclusive nature of the contract than are to be found in the one under consideration. In other words, unless the doctrine of strict construction is to be extended to the extent that a certain formula of words or terms is necessary to be used in order to denote an exclusive and sole right, the contract under consideration should be sustained, protected and preserved even under the principles recognized and enforced against us in the majority opinion of this court.

THIRD.

We shall next consider the third and fourth paragraphs of the petition to rehear together. Under these heads we respectfully submit:

1. That the court should have treated the contract of July 1, 1882, as a valid continuing agreement made by the city in virtue of its business powers, whereby, for the public good, it acquires for itself during a limited period a certain and sufficent supply of water for all public and private purposes.

2. That the city, without regard to the exclusive character of the contract, should be required to do all that is necessary upon its part to enable the Water Company to comply with and fulfill its contractual obligations—that is, the Water Company being required to procure and maintain a sufficient supply of water for all public purposes and private needs, the city should be compelled to take such water, and do nothing which would disable and cripple the Water Company in the performance of its obligations. To do this would be merely to compel the city, as stated by this court in the Walla Walla case, to have a decent regard for its contracts. And here again we call the attention of the court to the Walla Walla case (172 U. S., 1), wherein this court effectually prevented from impairment a contract which was not and could not be exclusive in its character. The city of Walla Walla was expressly inhibited from making an exclusive contract, and this court treated said contract as not being exclusive. Otherwise, it might have been objectionable upon the ground that it

was a monopoly, and therefore void, under the laws of the State of Washington.

We can add nothing to the reasoning and language of this court in the Walla Walla case, which has been repeatedly recognized and approved in subsequent decisions. We are either entitled to restrain in advance this effort to confiscate the plant and property of the Water Company upon the authority of the Walla Walla case, or upon the authority of the case of the Red River Bridge Co. *vs.* Mayor and Aldermen of Clarksville (1 Sneed, Tenn., 176), we are entitled to compensation from this defendant for the destruction of our property, which will inevitably follow the building of a competing plant by the City of Knoxville.

The questions involved in the Red River Bridge Co. case are fully set out in the statement of facts and opinion of the court, which we here take the liberty to quote in full:

"In 1829, the legislature granted to the plaintiffs, The Red River Bridge Co., the right to erect a bridge across Red river at the town of Clarksville, with the usual power to exact tolls of persons crossing the bridge, and stipulated in the charter that no other *toll* bridge should be at any time erected within one-half mile of plaintiffs' bridge. The plaintiffs erected their bridge at the place designated in their charter, and continued to exact tolls of persons crossing it, until the commencement of this suit. In 1847, the legislature authorized the municipal authorities of the town of Clarksville to purchase the plaintiffs' bridge or to erect a *free* bridge near to the same. The corporation (City of Clarksville) commenced building their bridge within a few feet of the plaintiffs' bridge; whereupon, it filed this bill in chancery at Clarksville, praying an injunction against the erection of said free bridge, and asking compensation for the damage sustained thereby. The chancellor dismissed the bill, and complainants appealed to this court."

The foregoing is a full statement of the case, as set out in the official report. The opinion of the court by McKinney, chief justice, is as follows:

"In view of all the facts of this particular case, we think the complainant is entitled to compensation, as prayed in the bill. *Whether or not the charter granted to the complainant contains the exclusive right alleged in the bill, and admitted in the answer, does not certainly appear, nor is it important to inquire how the fact is, with a view to the decision of the present case.* For, assuming that it is, still we think it clear that such exclusive right must yield to the public interest. And, admitting that the grant is a contract, and that it is inviolable, yet to hold that the property or franchises acquired under it may be taken for public use, 'upon just compensation being made therefor,' is not to impair the contract in the sense of the Constitution.

"The proof in this record establishes that the bridge of the complainant was amply sufficient for the accommodation of the public, and that the sole and avowed object of the erection of a free bridge, within a few feet of the former, was to divert the whole travel from it, and thereby destroy its value, under the belief that the inducements held out to the public by a free bridge would greatly promote the local interests of the town of Clarksville.

"It is manifest that the erection of a free bridge, under the circumstances of the case, amounts to a total destruction of the franchise granted to the complainant in principle and effect. The site and structure of the old bridge might as well have been taken and appropriated to the use of the new one; and while we concede that this might be done, and likewise concede that the grant to the defendant must be sufficient evidence that the public interest required that it should be done; yet, we hold that it could only be done upon the condition of making just compensation to the complainant for the franchises thus destroyed. It follows, therefore, that the

defendant must account for the reasonable value of complainant's bridge at the time of the completion of the free bridge. The decree will be reversed and an account ordered."

It will be noted, first, that in the grant to the Red River Bridge Co. the State only stipulated that it would not grant a charter to any other *toll* bridge within one-half mile of the Red River bridge. Upon principles of construction contended for and generally admitted in grants of this character, this sort of stipulation would not exclude the right to grant a charter to a free bridge. It is also manifest that the court, notwithstanding the pleadings, took this view of it, and declined to adjudicate that the Red River Bridge Co. was vested with an exclusive franchise, but held, in effect, that it was immaterial whether or not the franchise was exclusive; nevertheless, the Red River Bridge Co. was entitled to compensation for its property thus destroyed, when it could have been secured upon a reasonable and fair valuation, either by negotiation between the parties or by condemnation.

In the contract at bar, even if its necessarily exclusive features should be eliminated, there were means provided for taking over or purchase or condemnation—by whatever term it may be called—of the property of the Water Company at a fair valuation. This being so, and the bill (Rec., p. 21) plainly and positively averring that this property was built not only upon the faith of appellant's exclusive right to furnish water to the city, also with the distinct understanding that if the city within the period of the contract should desire to own and operate a water plant it would acquire the plant and property of appellant, it should either be restrained from building a competing plant, or compelled to purchase the plant and property of appellant, or to account for the reason-

able value of the property which it has thus destroyed. It is true there is no specific prayer in the bill to this effect—that is, asking for compensation for the value of the property—but a court of equity may grant under the prayer for general relief any relief other and different from that specifically indicated and prayed, which is justified by the averments of the bill (Story, Equity Plead., sec. 40; Dodd *vs.* Benthal, 4 Heiskel, 608; O'Connor *vs.* Knoxville Hotel Association, 93 Tenn., 108-110).

FOURTH.

If the court should be of the opinion that appellant is not entitled to the relief sought by it in the courts of the United States, then we respectfully but earnestly submit that the dismissal of its bill and affirmance of the judgment of the court below should be without prejudice to the end that the holders of its bonds, acquired long prior to the institution of this suit and purchased upon the implicit faith in the exclusive character of the contract of July 1, 1882, and relying (p. 21) upon the "distinct understanding that the city," if it desired to operate its own water plant within the contract period, "would acquire the plant and property of the Water Company under the terms and in the manner provided in said contract," may not be embarrassed in whatever proceedings they may be advised may be necessary to protect their property, and especially to receive in the courts of the State of Tennessee the benefit of the rule requiring compensation for property taken or destroyed by a municipality as laid down and enforced by the supreme court of Tennessee in the

case of Red River Bridge Company *vs.* Clarksville, 1 Sneed, 176.

We submit that it must be plain to your honors that petitioner has not "merely speculated" with the Federal courts in this its endeavor to prevent appellee city from violating its contract and building its own plant.

We submit that petitioner had good grounds to believe:

1. Not only that its contract supplied every element, the lack of which had caused this court to refuse relief to corporations claiming a sole or exclusive privilege, but also that it could not be distinguished from the Walla Walla case (172 U. S., 1), and was on all fours with the reasoning of the courts of appeals of the sixth and ninth circuits in the Cleveland case (98 Fed. Rep., 666), and the Helena case (122 Fed. Rep., 13).

2. *That this court would follow that construction of the contract of July 1, 1882, adopted by it in suit between petitioner and appellee city, wherein it was held in an unanimous opinion (189 U. S., 434) that exclusive privileges for thirty years" were conferred upon petitioner by said contract.*

That this is no mere afterthought or grasping after straws by a defeated litigant is shown by the averments of the bill (Rec., p. 12), which set out, plead, and rely upon the holding of this court in said case of The Knoxville Water Company *vs.* The City of Knoxville (189 U. S., 434) as settling the contention here made on behalf of petitioner in its favor.

If petitioner has been mistaken, we submit that its mistake, caused by the reasons set out, should not prejudice the trustee in mortgages or holders of bonds thereunder, executed long

prior to the institution of this suit and which provided the hundreds of thousands of dollars invested in this plant for the benefit of the city and its inhabitants, from taking such steps as they may be entitled to protect the large interests involved and now threatened with absolute destruction.

Respectfully submitted,

SAMUEL G. SHIELDS,
R. E. L. MOUNTCASTLE,
CHARLES T. CATES, JR.,
Solicitors for Petitioner.

FILE COPY.

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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905

NO. 123.

KNOXVILLE WATER COMPANY, APPELLANT,

VS.

MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE, ET AL.,

BRIEF IN BEHALF OF APPELLEES.

J. W. Culton,
John W. Green,
Solicitors.

BEAN, WARTERS & CO., PRINTERS, KNOXVILLE, TENN.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905

KNOXVILLE WATER COMPANY,
Appellant

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE, et al,
Appellees

No. 123

BRIEF ON BEHALF OF APPELLEES.

Statement of the Case.

This is a suit to enjoin the City of Knoxville from constructing and operating a municipal water plant. Complainant's claim for this relief is based upon a contract entered into between it and the City on July 1, 1882, by the terms of which it is insisted, Complainant was vested with the exclusive right to furnish said City and its inhabitants with water for a period of thirty years from August 1st, 1883. The particular clause of the contract which gives rise to this contention is as follows, viz.: "the City further obligates itself not to grant to any "other person or corporation, any contract, or privilege to furnish water "to the City of Knoxville, or the privilege of erecting upon the public "streets, lanes or alleys, or other public grounds for the purpose of "furnishing said City or the inhabitants thereof with water for the "full period of thirty years from the 1st day of August, 1883, provided "the Company comply with the requirements and obligations imposed "and assumed by them under and by virtue of this agreement." (Rec., p. 37).'

The case stands upon Bill and Demurrer and its salient features

are as follows: On March 31, 1903, the Legislature of Tennessee passed an act which was approved by the Governor on April 3, 1903, authorizing the City of Knoxville to own and operate a system of water works and to issue bonds for that purpose. (Rec., p. 74).

By the terms of this act the City might issue, for the purpose of purchasing or constructing water works, not exceeding $750,000.00 of interest-bearing coupon bonds. The entire work of purchasing, constructing, operating and maintaining said water works was vested in a Board of five Commissioners, who were authorized and directed to obtain from the Knoxville Water Company (the Complainant) a proposition for the sale of its plant and franchises to the City, and also to secure plans, specifications and estimates of the cost of the construction of a new system of water works, and submit the whole to the City Council for its consideration. No contract for either the purchase of the old water works or the construction of new water works should be made until the City Council should authorize it after it had been ratified by a vote of the people. (Rec., p. 76). In pursuance of this Act, the Commission which had been appointed by virtue of its provisions, on September 28, 1903, addressed a letter to the Knoxville Water Company asking if it would sell its plant and franchises, and if so, at what price and upon what terms. (Rec., p. 14). The Complainant replied to this letter on October 19, 1903, stating that it recognized the right of the City to purchase Complainant's plant, provided it was done under the terms and in the manner set out in the contract of July 1, 1882. (Rec., p. 15). It should be here stated that said contract provides that at the expiration of fifteen years from the completion of the water works, the City should have the right to buy the same by negotiations if thus the terms should be agreed upon, or, if not, then for a consideration to be determined by appraisers; that if said purchase was not made at the end of fifteen years, it might be made upon the same terms and conditions at the end of each year thereafter upon giving notice, etc. (Rec., pp. 38-39). On March 22, 1905, the Commissioners appointed under the Act aforesaid, replied to Complainant's letter of October 19, 1903, and said that they had nothing to do with the contract of July 1, 1882, and again asked Complainant if it would sell its plant and franchise, and if so, at what price. (Rec.,

p. 16). On April 27, 1904, Complainant in reply wrote the Commissioners that if the City concluded to buy its plant it could do so by having appraisers appointed who should fix the price, etc., (practically in accordance with the provisions of the contract of July 1, 1882,) and concludes by saying that it could not at that time name a fixed and specific price or the terms of payment. (Rec., p. 16-17). This ended the negotiations, and the Commissioners finding that their efforts to buy Complainant's plant were fruitless, reported to the City Council that they had been unable to obtain from Complainant a written proposition for the sale of its property, and further reported the estimated cost of constructing a new system of water works, the figures being less than the $750,000.00 which the Act of 1903 authorized to be expended for that purpose (Rec., p. 18).' Thereupon in accordance with the provisions of the said Act the City Council caused a vote of the people to be taken on the question of issuing said bonds for the purpose of building said water works, and the vote stood 1818 for the issuance of the bonds and 239 against the issuance of the bonds. (Rec., p. 19).

The City Council declared that the proposition to issue bonds and build an independent system of water works had carried by more than two-thirds of the votes cast, and was proceeding to let the contract to build the water works, and issue the bonds to pay for the same, when the injunction in this case put a stop to all further actions in that direction. (Rec., pp. 20, 24, 26). The Bill contains a minute historical account of the origin, growth, condition, circumstances, dealings and transactions of the Knoxville Water Company, and charges that if the City is permitted to build and operate its own water system, the result will be to destroy the value of Complainant's water system; reduce its income to a point where it will not pay operating expenses and fixed charges; confiscate and take its property and franchises without due process of law; and deprive it of the equal protection of the law in contravention of the 14th Amendment of the Constitution of the United States; impair the obligation of its contract with the City in contravention of Section 10, Article I, of the Constitution of the United States, and also of the Constitution of the State of Tennessee; and would be otherwise illegal upon other grounds not necessary to be now noticed. (Rec., p. 26).

The demurrer filed in behalf of the City of Knoxville raises two points, viz.: 1st, that the Court is without jurisdiction; 2nd, that none of Complainant's constitutional rights have been impaired. (Rec., pp. 84-85).

The Circuit Court overruled the first ground of demurrer and sustained the second, and the injunction was accordingly dissolved and the Bill dismissed. Complainant has appealed. (Rec., pp. 94-95).

The City of Knoxville has never in fact assumed to grant the Complainant the exclusive right to furnish the City and its inhabitants with water.

The contract between the City and the Complainant does provide that the City shall not grant "to any other person or corporation, any "contract or privilege to furnish water," for the period of thirty years, from August 1st, 1883. This language neither directly nor by implication contains any inhibition against the City itself in its municipal capacty from furnishing water for its own use and for that of its inhabitants. The thing, and the only thing provided against, is competition from individuals and other private corporations. The City had no legal right to exclude even these, as will be shown by authorities hereinafter cited, but it assumed to do so in terms by its contract. But the City did not assume to exclude itself from entering into competition with plaintiff, and if it had, its action would have been *ultra vires*, null and void. The very fact that the contract points out and specifies those who cannot exercise this privilege or franchise in competition with Complainant is an admission that such as are not thus pointed out and specified, may exercise said privilege or franchise. *Expressio unius est exclusio alterius.*

This principle was recognized by the Court in the case of Walla Walla vs. Walla Walla Water Co., 172 U. S., p. 15, where the City in granting a franchise to a water company contracted that it would not erect water works of its own, and the Court says: "this provision is "not devoid of an implication that it was intended to exclude only "competition from itself, and not from other parties whom it might "choose to invest with a similar franchise."

Jurisdiction.

Defendant's first ground of demurrer raises the question of jurisdiction. Both the Complainant and the Defendant are corporations organized under the laws of Tennessee, and are legal residents of that State. Before the Supreme Court can therefore take jurisdiction of a controversy between them it must appear that some constitutional question is properly raised. It is true that the decisions of this Court hold that the jurisdiction exists where the Bill claims in apparent good faith and not frivolously, that contract rights are impaired. But it is respectfully submitted that none of Complainant's rights are or can be infringed or impaired even although the contract may be exclusive in form, because such a contract is *ultra vires*, null and void.

The contract which Complainant claims has been impaired, does not either in terms or by implication, purport to be made by legislative authority or sanction. "A municipal ordinance not passed under sup-"posed legislative authority cannot be regarded as a law of the State "within the meaning of the constitutional prohibition against State "laws impairing the obligations of contracts."

Hamilton Gas Light Co. vs. Hamilton, 146 U. S., p. 266.

"Before this Court can be asked to determine whether a statute "has impaired the obligation of a contract, it must be made to appear "that there was a legal contract subject to impairment, and some ground to believe that it has been impaired.

New Orleans vs. New Orleans Water Works Co., 142 U. S., p. 79.

The extent of the power conferred by the Legislature upon the City of Knoxville.

The present Charter of Knoxville, (Acts of the Legislature of Tennessee, 1885, Extra Session, Ch. 8, by Section 2), confers upon the City authority to erect water works, and by Section 18, under the head of general powers it is provided as follows: "the Mayor and Board of "Aldermen shall have the following powers by ordinance, * * Sec. "7. To provide the City with water by water works within or beyond "the boundaries of the City, or provide for supplying the City with

"water otherwise and to provide for the prevention and extinction of "fires and to organize and establish fire companies."

This Act being passed subsequent to the execution of the contract in question, cannot, of course, affect the rights of the parties thereunder.

Prior to 1882, the date of the contract, the rights, powers and authority of the City of Knoxville are embodied in various statutes passed by the Legislature of Tennessee, during the preceding period of about seventy-five years. These Acts so far as they bear upon the question at issue, are as follows:

By the Act of the General Assembly of Tennessee, passed January 19, 1838, entitled "an Act to incorporate the inhabitants of the town of Knoxville, in the County of Knox," Ch. 179, Sec. 3, it is provided as follows: "that the Mayor and Aldermen of said corporation be, and "they are hereby authorized to borrow a sum of money not exceeding "$50,000.00, for the purpose of erecting water works and supplying said "town with water, and the Mayor and Aldermen are hereby authorized "to make and issue the bonds and scrip of said corporation for the "payment of said sum of money."

The Act of the General Assembly of Tennessee, Chapter 18, p. 44, passed December 7, 1866, provides "that the Mayor and Aldermen of "the City of Knoxville shall have and exercise all the rights, powers, "authorities and privileges which have heretofore been conferred by law "upon th City of Nashville."

The City of Nashville by the Act of the General Assembly of Tennessee, Chapter 138, p. 270, passed January 31, 1848, was authorized by sub-section 8, of Sec. 6, "to provide the City with water by water "works within or beyond the boundaries of the City."

The City of Nashville by Ch. 69, of the Acts of 1857-8, p. 145, amending "an Act entitled an act to reduce the several acts incorporat- "ing the town of Nashville into one Act and to amend the same, passed "January 31, 1848," was empowered to "purchase, receive and hold "property, real and personal, beyond the limits of "the City to be used

"for the burial of the dead, *for the erection of water works*, for the "establishment of a hospital, for a poor house or house of correction, "or for a public park or promenade or for any other purpose that the "City Council may deem necessary and proper."

These acts which were the laws in force on this subject at the date of the execution of the contract with the Knoxville Water Company, if not by their express terms, certainly by implication limit the power of the City of Knoxville to the construction of municipal water works, and do not directly authorize said City to let a contract for the construction and operation of a water works system to outside persons, firms or corporations.

The Act with respect to Nashville (which also defines the power of Knoxville) places water works in exactly the same category as the City Hospital, poor house and house of correction, and is susceptible of no other meaning than that the Water Works must belong to the city the same as the other designated agencies.

In the case of National Foundry Work v. Oconto Water Company, 52 Fed. Rep. p. 29, it was held that the City of Oconto under the "general welfare" clause contained in its charter, had no power to confer a franchise for owning and operating water works, and for other things collateral thereto, on the ground that this power is of legislative origin and can only be exercised when expressly authorized by the supreme legislative power of the state.

The attention of the court is respectfully called in this connection to the authorities cited in the later portions of the brief to the effect that municipal corporations have and can exercise only such powers as are expressly conferred or necessarily implied. A strict application of this rule renders the action of the City of Knoxville in letting the contract for the construction of water works to the complainant, or its predecessors, absolutely null and void.

It is claimed that the general corporation law of the State of Tennessee of 1875, as amended in Chapter 104 of the Acts of 1877, under which complainant was chartered, conferred authority upon the City of Knoxville to make this contract. But all that law does or purports

to do, is to authorize and provide for the organization of private corporations. It was not intended, nor can it, we respectfully submit, be construed as an amendment to the municipal charters of the State. If that had been its purpose, why, when the present charter of the City of Knoxville was granted in 1885, is it therein specifically set forth that the city should have authority to provide water works and provide for the supplying of the city with water, and for the prevention and extinction of fires? If any water company incorporated under the Act (1875) would have the authority to enter into municipal corporations and erect and operate its plant without regard to the charter of such municipal corporation, what was the use of conferring again in express terms upon the City of Knoxville by a charter provision the authority to provide for water works? The same Legislature (1875) which passed the General Private Corporation Law, under which complainant was chartered, also passed a General Municipal Incorporation Law which provides in sub-section 15, of Section 13, Chapter 92, that municipalities organized thereunder have the right *"to provide the municipality with water by water works or otherwise, within or beyond the boundaries thereof."* The same Act in Sec. 14 and the Amendment thereof, in the Acts of 1877, Chap. 121, Sec. 1, provides that *"any municipality hereafter incorporated under a general or special law or laws of this State, may adopt the charter contained in Article 1, of this charter, provided a majority of those voting at an election to be held for such purpose, shall vote in favor of such adoption."* It is respectfully submitted that the case of Nichols v. Nashville, 9 Humph. 258, relied on by appellant as authority for the statement that a power may be conferred upon a municipality by an independent act incorporating a private corporation, is not authority for the rule this invoked. That decision merely holds that the legislature had the authority to authorize the City of Nashville to take stock in a railroad having one of its termini in that city, the same being a legitimate corporate purpose. It seems to us that the most that can be claimed for complainant's charter in this respect is that it confers the right upon municipalities to construct water works in such cases alone where municipalities have availed themselves of the privileges of incorporation granted by the same Legislature that granted complainant's charter.

In answer to Complainant's contention that even if the City did not have the right under its charter or the natural right under the general law to make the contract in question, that the charter of the Water Company conferred such a right, we have to say that *Complainant's charter does not purport to give an exclusive right.* On the contrary, said charter contains on its face the following limitation upon Complainant's powers, viz.: "*By no implication or construction shall said corporation be deemed to possess any powers except those hereby expressly given or necessarily implied from the nature of the business for which the charter is granted. (Rec. p. 30).*

A municipal corporation cannot grant an exclusive privilege or franchise unless it has express legislative power to do so.

The Charter of municipal corporations or the general law under which they exercise their powers, is their constitution in which they must be able to show authority for the acts they assume to perform. They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers acting by a delegated authority; so that, while the State Legislature may exercise such powers of government, coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred and subject to such regulations or restrictions as are annexed to the grant.

Cooley's Con., Lim. p. 231, 4th Ed.

"Municipal corporations are created to aid the State government "in the regulations and administration of local affairs. They have only "such powers of government as are expressly granted them or such as "are necessary to carry into effect those that are granted. * * To the "extent of this authority they can bind the people and the property "subject to their regulation and government control by what they do, "but beyond their corporate powers their acts are of no effect."

City of Ottawa vs. Carey, 108 U. S., 110.

"A municipal corporation in the exercise of all of its duties,

"including those most strictly local or internal, is but a department of "the State. The legislature may give it all the powers such a being is "capable of receiving, making it a miniature State within its locality. "Again, it may strip it of every power, leaving it a corporation in name "only; and it may create and recreate these changes as often as it "chooses, or it may itself exercise directly within the locality any or all "the powers usually committed to a municipality. We do not regard "its acts as sometimes those of an agency of the State, and at others "those of a municipality; but that its character and nature remaining "at all times the same, it is great or small according as the Legislature "shall extend or contract the sphere of its action."

Barnes v. District of Columbia, 91 U. S., p. 540.

The powers exercised by all public corporations must be found in their charter which is based upon either a public or a special act.

Trustees Dartmouth College v. Woodward, 4 Wheat (U. S.) 518.

"A municipal corporation acts wholly under a delegated authority, "and can exercise no power which is not in express terms or by fair "implication conferred upon it."

Thomson v. Lee, 70 U. S. (3 Wall) 327.

"Counties, cities and towns are municipal corporations created by "the authority of the Legislature, and they derive all their powers from "the source of their creation, except where the Constitution of the State "otherwise provides."

Mount Pleasant v. Beckwith, 100 U. S., 524.

A public corporation is as already suggested, an artificial person, and as such capable of doing such acts and exercising such powers only as may be conferred upon it by the charter of its creation, or necessarily implied to carry into effect powers directly granted. The legal authority to execute a contract, therefore, lies at the basis of its validity; this may be found in charter, statutory or constitutional provisions and the absence of such authority acts as a limitation upon the right of the public corporation to contract. Contracts entered into without such authority or beyond the power of the corporation are necessarily void.

Persons dealing with public corporations are charged with notice of their rights to contract upon the subject matter and in the manner contemplated.

Abbotts Mun. Cor. Vol. 1, Sec. 249.

The case of Syracuse Water Co. v. Syracuse, 116 N. Y., p. 167 (5 L. R. A., p. 546), is quite similar to the case at bar. There the plaintiff was incorporated by the Legislature of New York in 1849, for the purpose of furnishing the City of Syracuse and its inhabitants with water. The charter provided that the Company should furnish the City with water for the extinguishment of fires and other purposes upon such terms as might be agreed on between them and that if necessary said terms should be fixed by Commissioners appointed by the Supreme Court; that in case the Company failed to furnish a wholesome supply of water within two years, upon notice and appraisement, the City should have the right to take over and become the owner of the water plant; that at any time after the expiration of twenty years the City should have the right to resume all the property rights, powers and privileges of the Company upon paying therefor in accordance with the provisions and methods pointed out by the charter. The City of Syracuse was proceeding to grant to the Central City Water Works Company the privilege of supplying the City with water when the Syracuse Water Company filed a Bill of Injunction based upon the impairment and invasion of its alleged exclusive right and franchise to furnish the City with water. The Court held that while when Plaintiff was granted its charter, the City had no other means or source of water supply in contemplation, and while Plaintiff had expended much money on its plant upon the faith of what it conceived its rights to be, that nevertheless in the absence of express charter or statute provision making the privilege exclusive, Complainant's rights were not impaired, and it could not maintain its injunction.

The case of Clarksburg Electric Light Company vs. Clarksburg, 47 West Va. 739, 50 L. R. A., 142, is strongly in point. There the town of Clarksburg on December 16, 1887, granted to the Clarksburg Electric Light Company the exclusive privilege for the term of twenty years to erect and operate electric light works. Under this grant said Com-

pany constructed a costly and valuable plant, and for a long time supplied the town and its inhabitants with electricity. In 1894 two other Electric Light Companies applied for and were about to obtain from the town of Clarksburg, authority to sell and supply electricity to the inhabitants thereof. Thereupon, the Clarksburg Electric Light Company relying upon its exclusive grant, sued out an injunction against the two new Companies and against the town of Clarksburg, restraining said Companies from furnishing electricity to said town and its inhabitants. The lower Court dissolved the said injunction, and the Electric Light Company appealed. The Supreme Court of Appeals of West Virginia held that under its charter provisions and the general statutes, the town of Clarksburg did not possess the power to grant an exclusive franchise to the Clarksburg Electric Light Company, and that a municipal corporation cannot grant an exclusive franchise unless it has received express power from the Legislature to do so.

The same principle was enunciated in the case of Walla Walla vs. Walla Walla Water Company, 172 U. S., p. 14, in this language: "had the privilege granted been an exclusive one, the contract might "be considered objectionable upon the ground that it created a monopoly "without an express sanction of the Legislature to that effect."

Monopolies may be created, but they can only be called into being by the sovereign power. Hence the exclusive franchises or privileges in the nature of monopolies cannot be granted by a municipal corporation, even where no express prohibition is found in its charter or Legislative Act applicable; for in no instance will such power be implied. Thus a municipal corporation cannot grant without authority from the Legislature in direct and express terms to any fuel or gas supply Company a monopoly of its streets, nor can such exclusive authority be granted to a railroad Company to lay its tracks in the streets. And while it has been held that the Legislature may grant such exclusive privilege, the weight of authority denies this power.

(McQuillin Mun. Ord. Sec. 190).

A town council in Rhode Island authorized by the statutes of that State to grant the right to lay water pipes and erect and maintain reser-

voirs upon such terms as it might deem proper, cannot grant to a Company the exclusive right to construct water works in the town. Nor does a town by giving a Company the use of the highways, as long as the inhabitants may be reasonably supplied with water, and exempting said Company from taxation and contracting that the Company shall sell its works to the town, exclude itself from constructing municipal water works.

Westerly Water Works Co. v. Westerly, 80 Fed. Rep. 611.

The principle laid down in these cases cannot be changed by reason of the fact that the City of Knoxville has acquiesced in the contract for a number of years, or that to allow the City to build water works of its own would work a hardship on Complainant by lessening the value of its plant and diminishing the amount of its income. As was said by the Court in the case of Westerly Water Works Co. v. Westerly, *supra*, "When we are dealing with questions of franchises or contracts wholly "or partly exclusive of public rights, we must adhere to the requirements "of clear and express legislative authority. To base such exclusive rights "upon a grant or contract of a body without authority, and then to ratify "and confirm such grant or contract by the mere silence of the public, or "by uncertain and ambiguous expressions, or by acts which may be "interpreted either as acquiescence or as mere sufferance, is to establish "a new source of grants in derogation of public right."

Id. 619.

The Supreme Court of Tennessee where the City of Chattanooga undertook by ordinance to grant to S. T. Wilcox and his associates the sole right to construct and operate a Telephone and Electric Plant for a period of twenty-one years, held upon suit brought by tax payers enjoining the City from carrying the said ordinance into effect that the Complainants were not entitled to the relief sought and used in passing the following language: "We shall enter into no discussion "of the power of the City to grant an exclusive franchise. It may be "admitted that no such power exists. But this gives no aid to Com- "plainants. The want of this power could only make the exclusive "feature invalid."

Patton v. Chattanooga, 108 Tenn., 229.

The same Court in case of Peoples' Passenger Railroad Company vs. City of Memphis, 3rd Shannon's Tennessee cases, page 193, holds that a municipal corporation has no power, in the absence of Legislative sanction or authority to enter into a binding contract with individuals or a private association for the construction and exclusive use and operation of street railways on and over the streets of the City for private profit.

The presumption is against the creation of an exclusive franchise and where the grant itself does not in terms confer conclusive rights, none will be implied.

Where the Legislature of New York passed an act authorizing the City of Brooklyn to condemn the property of the Long Island Water Supply Company for public use, and the Water Company resisted the right of the City to make said condemnation, this Court held that the City had the right to condemn, and that in a case where neither the statute under which the Water Company was organized, nor the contract with the town Company to furnish a water supply, nor the act annexing the said town to the City of Brooklyn, contained words of exclusion, such Company had no exclusive privilege and was not beyond the reach of the Legislative action. The Court in disposing of this proposition says:

"Grants from the public are strictly construed in favor of the "public, and grants of a privilege are not ordinarily to be taken as "grants of an exclusive privilege."

Long Island Water Supply Co. v. Brooklyn, 166 U. S., p. 685.

In the case of Skaneatales Water Works Company vs. Skaneatales, 184, U. S. 354, where the village of Skaneatales, by virtue of a statute of the State of New York, had granted to a water company the right to construct water works and supply water to the village and its inhabitants for a period of five years, and where, at the expiration of the five years the village constructed an independent system of water works of its own, whereupon the Water Company brought suit to restrain the further construction and operation by the village of said water works, on the ground that the village had impliedly contracted not to construct

water works of its own, this Court held: "there is no implied contract "in an ordinary grant of a franchise such as this, that the grantor will "never do any act by which the value of the franchise granted him in "the future will be reduced. Such a contract would be altogether too "far-reaching and important in its possible consequences in the way of "limitation of the powers of a municipality, even in matters not imme-"diately connected with water, to be left to implication. We think none "such arises from the facts detailed.

Skaneatales Water Works Co. v. Skaneatales, 184, U. S., p. 363.

Bienville Water Supply Co. v. Mobile 175 U. S., p. 109.

Where the City of Joplin was enjoined from supplying its inhabitants with incandescent lights by the Southwest Missouri Light Company upon the ground that said Company had been granted the right to erect and maintain an electric light plant for a period of twenty years which it had done at considerable expense, and that the City had within said period of twenty years entered into the business of commercial electrical lighting in competition with Complainant, and that the law authorizing said City to erect and maintain said plant impaired the obligation of Complainant's contract with the Company, and deprived the said Company of its property without due process of law, this Court held that "the limitation contended for is upon a governmental agency and restraints upon said agency must not be readily "implied. The Appellee consents, as we have seen that it has no exclusive right, and yet contends for a limitation upon the City which might "give it (the appellee) a practical monopoly. Others may not seek to "compete with it, and if the City cannot, the City is left with a useless "potentiality while the appellee exercises and enjoys a practically exclu-"sive right. There are presumptions, we repeat, against the granting "of exclusive rights and against limitations upon the powers of "government."

Joplin v. Light Co., 191 U. S., 150, 156-157.

This Court in the recent case of Helena Water Works Company v. Helena, 195 U. S., p. 383, referring to the three cases above cited, thus restates the principles therein enumerated, viz.: "These cases hold

"that the grant of the franchise does not of itself raise an implied "contract that the grantor will not do any act to interfere with the "rights granted to the Water Works Company, and that in the absence "of the grant of an exclusive privilege, none will be implied against "the public, but must arise, if at all, from some specific contract "binding upon the municipality." Under the ordinances passed by the City of Helena it was expressly provided that nothing therein contained should be so construed as to give the water company or its successors the exclusive right of occupying streets or the exclusive right of distributing or selling water through said City. It was further provided that during the term of the agreement, which was twenty years, that the Company should provide all the inhabitants of the City with a full ample and sufficient supply of water. The City was enjoined from erecting a plant of its own upon the ground that the Water Company was obligated to furnish water to the City and its inhabitants for twenty years, and that this contract would be impaired, and its benefits to the Company destroyed, if the City should erect an independent plant of its own. The Court denied the Complainant's contention and among other things held as follows: " * * * Had it been intended to exclude "the City from exercising the privilege of establishing its own plant "such proposition could have been expressed by apt words. It is "doubtless true that the erection of such a plant by the City will render "the property of the Water Company less valuable, and perhaps unpro-"fitable, but if it was intended to prevent such competition, a right to do "so should not have been left to argument or implication, but made "certain by the terms of the contract. The privilege of building other "works was, in the absence of some binding contract forbidding the "exercise of the power, clearly within the City's constitutional and "statutory rights. We cannot find that the City has precluded itself "from exercising this right by anything shown in this case."

"The State, it is presumed, has no favors to bestow, and designs "to inflict no arbitrary deprivation of rights. Special favors are always "obnoxious, and discriminations against persons or classes are still more "so; and as a rule of construction, it is to be presumed that they were "probably not contemplated or designed. * * * Grants, however, which confer upon a few persons what cannot be shared by the many,

"and which, though supposed to be made on public grounds, are never-"theless frequently of great value to the corporators, and therefore "sought with avidity, are never to be extended by construction beyond "the plain terms in which they are offered. * * * * The just pre-"sumption in every such case is that the State has granted in express "terms all that it designed to grant at all."

Cooley's Constitutional Limitations, p. 493-495, 4th...Ed.

"Doubts as to what is granted are resolved in favor of the grantor, "or, as aften epigrammatically said, 'a doubt destroys a grant.'"

Jackson Horse Railroad Co. v. Interstate Rapid Transit Railway Co. 24 Fed. Rep. 306.

The Supreme Court of Tennessee has declared that where an exclusive right or privilege is claimed, nothing is to be taken as conceded, but what is granted in unmistakable terms.

Turnpike Co. v. Montgomery County 100 Tenn. p. 417

This Court as far back as the well known case of Charles River Bridge Co. vs. Warren Bridge Co. 11 Peters 545, gave expression to the same principle in the following terse sentence: "In grants by "the public nothing passes by implication."

The public is favored by the Courts where questions of this character arise.

In the case of Stein vs. Bienville Water Supply So. 141 U. S. p. 67, it appeared that Stein by a contract with the City of Mobile made in 1840,(and confirmed by an act of the Legislature passed January 7, 1841, acquired the exclusive right to supply the City of Mobile and its people with water "from the Three Mile Creek" for a designated term of years, and until the city should pay him his heirs, executors and assigns the actual value of said water works, as determined in the mode pointed out by the contract. By an act of the Legislature of Alabama passed in 1883 the Bienville Water Supply Co. was incorporated for the purpose and with the exclusive right for twenty years of supplying from any point "other than Three Mile Creek," such pure water as the domestic sanitary and municipal wants of Mobile might require. Stein, in

good faith, out of his means and with borrowed money, had expended more than $200,000.00 in the construction of a water works system which he kept in good order and condition, and thereby supplied the city of Mobile and its inhabitants with water. In a suit brought by Stein to enjoin the Bienville Company, it was held that Stein's exclusive privilege was limited to taking and furnishing water from "Three Mile Creek" and that "we are forbidden to hold that a "grant under legislative authority, of an exclusive privilege, for a term "of years, of supplying a municipal corporation and its people with "water drawn by means of a system of water works from a particular "stream, prevents the State from granting to other persons the privilege "of supplying, during the same period, the same corporation and people "with water drawn in like manner from a different stream or river."

In the case of Hamilton Gas Light Co. vs. Hamilton, 146 U. S. p. 258, the facts show that the Gas Company was incorporated under the general statutes of Ohio of 1852 with authority to lay pipes and furnish gas for public or private purposes. By an ordinance of the City of Hamilton passed in 1855 the Hamilton Gas Light Company was given the exclusive privilege of laying pipes, etc., for the period of twenty years. This contract was renewed at different times but in January, 1889, the City Council passed a resolution reciting the termination of the last contract, and that it would not thereafter pay said company for any lighting and the company was forbidden the use of the lamp-posts of the city. Immediately thereafter the city, acting under the authority of the Revised Statutes of Ohio, took steps to issue bonds for the purpose of erecting gas works of its own. Thereupon the company brought suit to perpetually enjoin the city from disconnecting the company's mains from the lamp-posts, and from issuing bonds for the purpose of erecting a municipal gas plant. The court uses this language in denying plaintiff relief, "it may be that the erection and maintenance "of gas works by the city at the public expense and in competition with "plaintiff, will ultimately impair, if not destroy, the value of plaintiff's "works for the purposes for which they were established. But such "considerations cannot control the determination of the legal rights of "the parties. Nor does every statute which affects the value of a con-"tract impair its obligation. It is one of the contingencies to which par-

"ties look now in making a large class of their contracts, that they may "be affected in many ways by State and national legislation."

"If parties wish to guard against contingencies of that kind, they "must do so by such clear and explicit language as will take their con- "tracts out of the established rule that public grants susceptible of two "constructions must receive the one most favorable to the public."

Hamilton Gas Light Co. v. Hamilton, 146 U. S. 963.

Appellants Contentions.

It is not pretended that all exclusive grants of franchises of this character are invalid. This Court in the case of New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., p. 650, sustained an extension of twenty years of an exclusive grant to a Gas Company. And an exclusive grant for fifty years to a water company, was held valid in the cases of New Orleans Water Works Co. vs. New Orleans, 115 U. S., 674, and St. Tammany Water Works Co. vs. New Orleans, 120 U. S. 64. It was also held that an exclusive franchise to the Louisville Gas Company for twenty years was good in the case of Louisville Gas Company vs. Citizens Gas Company, 115 U. S., p 683. And in the case of Walla Walla vs. Walla Walla Water Co., 172 U. S., p. 1, it was held that a contract granting to a water company the privilege of furnishing water to the City of Walla Walla and its inhabitants for twenty-five years and an undertaking on the part of the City not to erect or become interested in any other water works was lawful. *But in every instance above cited, the authority to make the contract and grant the franchise, was expressly conferred by the Legislature."*

It is contended that the rights of the parties to this suit must be determined by the same rules that would be available to private individuals in cases of like character, but such is clearly not the law. *"Persons dealing with public corporations are charged with notice of their rights to contract upon the subject matter, and in the manner contemplated." (Abbott's Municipal Corporations supra.)" If there is no legal authority for the contract, that authority cannot be created through the application of any doctrine or principle of estoppel, acceptance or ratification. The contract cannot be enforced. (Id. Vol. 1, Sec. 280.)*

In the case of *Nashville v. Hagan, 9 Bax. (Tenn.) 495*, the Supreme Court of Tennessee held that the City of Nashville was not liable for the price of certain material, bought and used by it for the improvement of its water works system, because the contract therefor was made without authority, and because there was no general law or ordinance authorizing the execution of said contract.

And as was held in the case of *Westerly v. Westerly, supra, If a contract which a municipal corporation had no power to make in the first instance, should be held good upon the doctrine of estoppel or acquiescence, a new power other than the Legislature would then accomplish by indirection that which the law expressly declares cannot be accomplished by direction.*

Complainant's contention with respect to its contracts with North Knoxville and West Knoxville, and the assumption of said contracts by the City of Knoxville, is unsound. Under its contract with North Knoxville complainant undertook to supply said town and its inhabitants with water until June, 1913. Under its contract with West Knoxville the Lonsdale-Beaumont Water Company undertook to supply said town with water for twenty years from September 17, 1892. Under the Act 1897 consolidating North Knoxville and West Knoxville with the City of Knoxville, the latter obligated itself to carry out and perform all lawful contracts of the two first named towns. The water contracts of these two towns may have been lawful, but they were certainly not exclusive either in terms or intention, and there is nothing in either of them which would prohibit the City of Knoxville from building and operating a water plant of its own under the well settled doctrine laid down in *Joplin v Light Company*, and *Helena v. Helena Water Company*, and other cases cited above.

Complainant cannot sustain or strengthen its position by relying upon the holdings of the Chancery and Supreme Courts of Tennessee, in the suit it brought and maintained to collect hydrant rentals in the year 1885. The city having used the Complainant's water was bound on the plainest principles of equity to pay for the same, and the questions raised in that case were upon an entirely different issue from the issues here raised, and do not appear to have been the same or

similar in any respect to those raised in this case. Neither in that case nor in the rate case also relied on, was the right of complainant and the city to make the contract in the first instance, drawn in question.

Com plainant's effort to distinguish between an exclusive right or contract or easement granted to a street railroad company and to a water works company is not successful. The fundamental objection to all contracts of this character is that they are exclusive and prejudicial to the public, and it can make no difference whether the question arises between a railroad company, gas company or water company, or any other public service corporation. That the exclusive feature of contracts of this character is obnoxious to the spirit of the law is too well established by the cases already cited to need further comment. It is true that complainant's charter gave it the right to lay down pipes through the streets, lanes and alleys of the city. But this charter could not enlarge, limit or affect the city's powers. And it is respectfully submitted that complainant without a special permit from the city designating which particular streets, lanes and alleys it might operate in, would have no rights of any sort in said streets and would be a mere trespasser.

It is claimed that complainant's charter and its contract with the defendant have been recognized and approved by the Legislature of Tennessee in Chapter 12, of the Acts of 1903. This Act was passed for the purpose of authorizing the City of Knoxville to issue bonds in order to provide a fund for the purchase of complainant's plant, and it was passed on January 29, 1903, and was repealed by the same Legislature on March 31, 1903. There is no ratification in this Act of complainant's contract. It is merely recognized as a necessary incident to the main purpose of the statute which was to provide a fund with which to pay for the water works upon an agreed valuation. It is not doubted but that the Legislature may validate contracts which are illegal on account of the failure of the parties to comply with some statutory requirements, (See Butler v. Building & Loan Ass'n. 97 Tenn. 679, and Swope v. Jordan, 107 Tenn. 166). But in these cases the validating act in express terms declared that the contracts in question should be as valid and binding in all respects as if

there had been an original compliance with the statutes governing such cases. A mere reference to a contract by the Legislature, it is respectfully submitted, cannot be construed into a construction of the contract, or into a declaration of the power of the parties to enter into it in the first instance.

Under the rule that municipal corporations can exercise no power which is not in express terms or by fair implication conferred upon it, it is submitted that a mere recognition by the Legislature of a contract entered into between a municipal corporation and a water company will not suffice to clothe it with the authority which was lacking in the first instance. The Legislative ratification of a contract without evidence that such ratification was procured with the assent of the city, or had been subsequently acted upon, does not make the contract obligatory upon the city. (*Hasbrouk v. Milwaukee, 13 Wis. 37.*) The Chief Justice of Wisconsin in delivering the opinion in this case says: *"The question is, can the Legislature by recognizing the existence of a previously void contract and authorizing its discharge by the city, or in any other way coerce the city against its will into a performance of it, or does the law require the assent of the city, as well as of the Legislature, in order to make the application binding and efficacious?. .I must say that in my opinion the latter act as well as the former, is necessary for that purpose, and without it the application cannot be enforced.. * * * And to admit that the Legislature, of its own choice and against the choice of either or both of the contracting parties, can give it life and vigor, is to admit that it is within the scope of legislative authority to divest settled rights of property and to take the property of one individual or corporation and transfer it to another."*

The case of Walla Walla v. Walla Walla Water Company so strenuously relied on by appellant, we also invoke as an authority in support of appellees' position. The court expressly declares in its opinion, that the case upon its merits depends largely upon the power of the city under its charter, and that is expressly what we contend for in this case. The court held in the Walla Walla case that the city had the charter power to make the contract it did make. In the case at bar there is no such power given in express terms, and the implication

is against it. In the Walla Walla case the city when enjoined was proceeding to erect a system of water works of its own in the face of a positive provision in its contract that it would not, as a city, enter into competition with the water company. In the case at bar there is no such provision. On the contrary the competition which the contract protects the water company from is that of other persons or corporations. This omission of the city to designate itself raises an implication that it was intended to exclude others and not itself from competition with the appellant.

In the case of Red River Bridge Company vs. Mayor and Aldermen of Clarksville, (I Sneed, 176,) the Supreme Court of Tennessee held that "a grant by charter from Legislature of an exclusive right to build a toll-"bridge within certain limits, although a contract, is such an exclusive "right as must yield to the public interest, and the franchise acquired "under it may be taken for the public use, upon just compensation being paid "therefor, without violating said contract or impairing its obligation in the "sense of the Constitution."

The same doctrine is announced in the case of Turnpike Company vs. Davidson County, 106 Tennessee, p. 258.

Where the Memphis Gaslight Co. was chartered by the Legislature of Tennessee in 1851, and was given "the privilege of erecting, establishing "and constructing gas works and manufacturing and vending gas in the "City of Memphis by means of public works for the term of fifty years "from and after the date of this act," the Supreme Court of Tennessee held that "there is not only no language in the Statute which directly con-"fers an exclusive right upon the Company, but there is none from which "an exclusive right can be implied."

Memphis Gayoso Gas Co. v. Williamson, 9 Heisk, p. 314.

A grant of a right to occupy the streets of the City of Knoxville with the lines of a Street Railway cannot be conferred by ordinance alone, and if conferred by charter is inoperative until assented to by valid ordinance. A charter right without an ordinance applying it, is inoperative, and an ordinance not based upon and conforming to the charter is void.

Citizens Railway Co. v. Africa, 100 Tenn. p. 26.

Complainant lays great stress upon its right under its charter. But when it accepted said charter it did so with the full knowledge conveyed by its express terms and language, that *"the right is reserved in the "Legislature to repeal, annul or modify this charter."* (Rec. p. 30.) The Act of 1903, Chapter 153 which is attacked by Complainant as

impairing the obligation of its contract, is simply an exercise of the right reserved by the Legislature in Complainant's charter to modify the same.

And since Complainant alleges that Defendant's proposed action will make it impossible for Complainant to meet its fixed charges, it may not be out of place to call the Court's attention to the method by which one of these fixed charges was created. By an amendment to Complainant's charter (Rec., p. 32), Complainant is prohibited from issuing bonds in excess of $150,000, and said amendment further declares that *"all bonds issued in violation of this provision as to said corporation "shall be utterly null and void; shall not be obligatory upon said Corpo- "ration as a debt, nor in any way constitute a charge upon its property, "real or personal, but shall be only the personal and individual liabilities "and obligations of the officers and stockholders actually participating "in such wrongful issuance of the same."* Whereas Complainant shows in its Bill that by simple contract it assumed the right, in violation of this express provision of its charter, to issue prior to the first day of January, 1901, $800,000 of bonds (Rec., p. 11).

We cannot better close this brief than by quoting from the opinion of the learned Judge who decided this case below, as follows: *"I "conclude that if the City of Knoxville had expressly inserted in the "contract a stipulation that it would not itself during the contract with "the Complainant Company erect and operate a water works plant, and "further that it would not contract with or grant the right to others to "do so, and had attempted in that way expressly to make the rights "granted to the Complainant Company exclusive, that such a particular "stipulation in the contract would have been invalid for want of Legisla- "tive authority to do so, and not because there would have existed "constitutional objection to such a provision. * * * I conclude "that when the Legislature of the State has not in the franchise grant "made the use and occupation of the streets exclusive for a term of "years, nor expressly authorized the municipal corporation to do so, "that the latter is without authority to do so, and that an express pro- "vision to that effect inserted in its contract would be invalid."*

There is no other error in the decree of the lower court, and it should be affirmed. Respectfully submitted,

J. W. CULTON,
JOHN W. GREEN,
Solicitors for Appellees.

Supreme Court of the United States.

No. 123.—October Term, 1905.

Knoxville Water Company, Appellant, *vs.* The Mayor and Aldermen of the City of Knoxville et al. } Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

[January 2d 1906.]

Mr. Justice Harlan delivered the opinion of the Court.

This suit was brought by the Knoxville Water Company, a corporation of Tennessee, against the City of Knoxville, a municipal corporation of the same State, and against certain individual citizens of Tennessee constituting the Waterworks Commission of that city.

Are the rights which the plaintiff sought to protect secured by the Constitution of the United States in any such sense as to make the case—the parties, all, being citizens of Tennessee—one arising under that instrument and therefore one of which the Circuit Court could take original cognizance? An answer to these questions, it would seem, requires for their intelligent solution a somewhat extended statement of the facts.

The Water Company, by its charter granted in 1877, was authorized to establish waterworks of sufficient capacity to furnish the corporate authorities and inhabitants of Knoxville with water. To that end it was empowered to lay down pipes through the streets, lanes and alleys of the city; bring into the city a sufficient supply of water by means of pipes or tanks, or in any other way; construct reservoirs; supply with water the inhabitants of the city and its environs and all who may be along the lines of the company's pipes; erect hydrants or fire plugs; and contract with the inhabitants and with the corporate authorities of the city or any incorporated companies for the use of water, charging such price for the same as might be agreed upon between the company and the parties.

Prior to 1882—taking the allegations of the bill to be true, since the case went off in the Circuit Court upon demurrer to the bill—the City of Knoxville determined to establish a system of waterworks, and to that end it purchased certain real estate. But that scheme having been abandoned or having been ascertained to be unwise and impracticable at that time, the city advertised for bids and proposals by responsible parties for the erection of waterworks, which, after being built, it was to have the option of purchasing at a time to be agreed upon.

The advertisement brought two competitive propositions, one by the City Water Company and the other by the present plaintiff. The proposition of the plaintiff was accepted, and thereupon the city and the plaintiff on the 1st day of July 1882 entered into an agreement or contract which is the foundation of this suit.

By that agreement the Water Company stipulated (omitting many minor details): That it would erect and establish on the land acquired by the city a system of waterworks, with reservoir and all necessary mains, pipes, hydrants, machinery, buildings and other appurtenances and incidents sufficient to supply the city with water to be taken from the Tennessee River at the site purchased by the city for that purpose—the waterworks and fixtures throughout to be of first-class materials, capable of furnishing 2,000,000 gallons of water every twenty-four hours and affording an uninterrupted daily supply to the city of such quantity as might be required, not exceeding the amount above specified, and the reservoir to be built on a specified site, and to have a capacity of 3,200,000 gallons of water. The company was to furnish water free of charge (except the rental of hydrants) from hydrants for the sprinkling of streets and flushing of gutters and sewers along, on or under such streets as were curbed, guttered or sewered; also, free of charge, water for all purposes of the fire department and for supplying the city hall buildings, office and prison. It was to purchase at the price of $7,800 the property then already acquired by the city for the purpose of erecting waterworks, including lands, plans, specifications, drawings, maps, etc., and to pay therefor within thirty days from the execution of the agreement and before the construction of said works. It engaged to supply private consumers with water at a rate not to exceed five cents per hundred gallons, the cost of introducing from the mains, and the cost of meter when used, to be borne by such private parties. The work of construction was to be commenced within thirty days from the execution of the agreement, and the works to be completed, ready for use, within twelve months thereafter. The company was to maintain the waterworks stipulated to be built by it in such condition as would enable it to comply with its undertakings for the period of thirty years from January 1st 1883, unless the city should become the owner of the same within that period. At its own expense it was to establish with the waterworks a system of telegraphic fire alarms of such quality and efficiency as those in general use in cities, consisting of two alarm boxes in each of the (then) eight wards of the city, with proper telegraphic connections with a central station.

In consideration of the promises and undertakings by the Water Company, as set out in the above agreement, the city covenanted and agreed, among other things, "not to grant to any other person or corporation, any contract or privilege to furnish water to the city of Knoxville, or the priv-

ilege of erecting upon the public streets, lanes, or alleys or other public grounds for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty years from the 1st day of August A. D. 1883, provided the company comply with the requirements and obligations imposed and assumed by them under and by virtue of this agreement;" also, "to pay to said company for rent of the seventy-five hydrants hereinbefore stipulated to be erected fifty dollars each per annum, payable in quarterly instalments on the last day of each quarter, beginning on the day upon which the city shall commence receiving a supply of water from said works, and for any additional hydrants erected for the use of the city it will pay in the same manner at the rate of not more than fifty dollars each per annum. . ." Recognizing the benefit and advantage accruing to it and to its citizens from the construction of the waterworks and the erection of hydrants, the city also covenanted and agreed with the Water Company "to pay, in addition to the anual rent of fifty dollars, as hereinbefore provided, and as an additional annual rent for the said seventy-five hydrants, a sum equal to that which, under the laws of the State and the ordinances and resolutions of the city, would be annually assessed as taxes for city purposes and uses on property of the same kind, quantity and value as that owned by the said Water Company within the corporate limits of the city of Knoxville: Provided, that the said additional annual rental shall only be paid for the term of five years next following 1st of August 1894, and no longer."

It was further mutually agreed and understood between the parties that at the expiration of fifteen years from the time fixed for the completion of the waterworks the city should have the right, upon giving one year's notice of such purpose and intention, to purchase from the company the waterworks provided for, and all the property, rights, franchises and privileges thereto belonging; by negotiations, if the terms could in that way be agreed upon, or if not then at any time for a consideration to be fixed and determined by appraisers; and if not purchased at the end of fifteen years, the waterworks plant, franchises, rights, privileges, etc., could be purchased by the city upon the same terms and conditions and in the same way at the expiration of each and every year thereafter. But in no case was such right of purchase to exist or be exercised unless due notice thereof was given one year before the expiration of the period aforesaid or either of them. If the parties differed as to price, the matter, the agreement provided, was to be determined by appraisers designated in a particular way, and whose award should be final and conclusive. It was further stipulated that the Water Company should not transfer, set over or assign the agreement for the construction of the waterworks to any company, corporation or individual whatsoever.

By an ordinance adopted October 20th 1899 the city consented to the consolidation of the Knoxville Water Company and the Lonsdale-Beaumont Water Company, and made certain changes both in the contract between the latter company and the town of West Knoxville and in the above agreement of 1882. It is not necessary to set out these changes.

We come now to the act of the Tennessee Legislature of February 29th 1903, passed avowedly for the purpose of enabling the city to exercise the option it had under the agreement of 1882 and the ordinance of 1899 to purchase and acquire the plant and property of the Water Company and maintain it for the benefit of its people. To that end the act authorized the city to issue bonds to an amount sufficient for that purpose, upon the agreed valuation of the parties, or in default of same, upon a valuation to be ascertained and fixed by appraisers, and to such additional amount as would be necessary in making additions to the plant, including real estate required for such additions. It was, however, provided that bonds should not be issued unless approved by the assent of two-thirds of the qualified voters of the city, expressed at an election duly held to ascertain their wishes. The execution of the provisions of the act was committed to a Water Works Commission, to be created by the City Council, and to have the power to make all contracts for the maintenance and extension of the plant.

Subsequently, the Legislature passed the act of April 3d 1903, (also amending the above act of February 2d 1903,) whereby the city was authorized to acquire, own and operate a system of waterworks, either by purchase or construction, and for that purpose power was given to issue interest-bearing coupon bonds to an amount not exceeding $750,000 under the restrictions named in the act. The act created a Waterworks Commission of five members, to be elected by the City Council, and to have the entire supervision, under prescribed restrictions, of the purchase or construction, operation and maintenance of any system of waterworks established under the sanction of the act. The act embodied, among others, a provision authorizing and directing the Commissioners to obtain from the Water Company a written proposition for the sale of its plant, franchises, etc., to the city of Knoxville, giving the price and terms of payment, together with the opinion of competent, disinterested experts as to the cost and present value of the plant; the commission to secure plans, specifications and estimates of the cost of the construction of a new system of waterworks, and to report all matters to the City Council for its consideration, but not to close any contract for the purchase or construction of waterworks until it had been duly authorized to do so by the City Council city after the proposition shall have been ratified by a vote of the people.

If the city determined to construct, equip and maintain its own system of waterworks, then for the purpose of securing sites for pumping stations

and other necessary purposes, including the laying of mains and water pipes and sites for reservoirs and filtering galleries, extensions, improvements and alterations, it was given the right of condemnation of grounds within and without its corporate limits.

There is no need to refer to other provisions of the agreement of 1882. But it may be said in this connection that an election was held on the 2d day of July 1903; and the City Council—having express authority to declare the result of the election—declared, by ordinance, that 1,818 votes had been cast in favor of, and only 239 votes against, an issue of bonds for the construction by the city of a system of waterworks. It may be also stated, in this connection, that after the passage of the two acts of 1903, and before the above election, some correspondence ensued between the Water Commission and the Water Company in reference to the purchase of the latter's plant. But the parties failed to agree as to the mode of ascertaining the value of the company's plant, and negotiations ceased. It is not important to inquire which side, if either, was to blame in this matter. Suffice it to say that the City Council, on or about May 20th 1904, conceived and was about to enter a plan of establishing a system of city waterworks wholly independent of, and in competition with, that maintained by the Water Company.

The present suit was brought upon the theory that the legislative enactments of 1903 were laws impairing the obligations of the contract of 1882 between the Water Company and the city, as well as upon the theory that the maintenance by the city of a system of waterworks in competition with those of the Water Company would inevitably destroy the value of the latter's property, and be a taking, under the sanction of the State, of the company's property for public use without compensation, in violation of the due process of law enjoined by the Fourteenth Amendment.

The substantial relief asked was a perpetual injunction restraining the city, its agents or officers, and the Waterworks Commission from entering into any contract for the construction of a separate, independent and competing plant, and from issuing any bonds for such a purpose.

Upon the question of the jurisdiction of the Circuit Court to take cognizance of this case, without regard to the citizenship of the parties, but little need be said. The Water Company, as we have seen, insists that the agreement of 1882 constituted a contract, whereby it acquired, for a given period, an exclusive right, by means of pipes laid in the public ways and a system of works established for that purpose, to supply water for the use of the city and its inhabitants. It also insists, as just stated, that the obligation of this contract will be impaired if the city, proceeding under the acts of the Legislature and under the ordinances in question, establishes and maintains an independent, separate system of waterworks in competition with those of the Water Company. These questions having

been aptly raised by the company's bill, the case is plainly one arising under the Constitution of the United States.

The fundamental question in the case is whether the city, by the agreement of 1882, or in any other way, has so tied its hands by contract that it cannot, consistently with the constitutional rights of the Water Company, establish and maintain, a separate system of waterworks of its own. If the city made no such contract that will be an end of the case; for, in the absence of a contract protected by the Constitution of the United States, the Circuit Court could not take cognizance of the dispute between the parties, all citizens of Tennessee; and it could not be said that any taking of private property for public use could arise merely from the construction and maintenance by the city of a waterworks plant.

The principles which must control in determining the scope and obligations of the agreement of 1882 have been clearly outlined in our decisions. We may assume, for purposes of the present discussion, but without deciding, that the City of Knoxville was invested by the Legislature with full authority, or that under its general municipal powers it could bind itself by contract, to give to a single corporation or company the *exclusive* right for a specified period to supply water for the use of itself and its inhabitants. It will yet be conceded that whatever authority it possessed in this matter was granted solely for the public good, and that in every substantial, legal sense the agreement with the Water Company is to be deemed a public grant, entitling that company to exercise certain public functions that appertain to the city as a municipal corporation.

Although the doctrines which must control in determining the scope of such a grant are clearly settled and are familiar, it may be well to recall the words of some of the adjudged cases. In *Charles River Bridge* v. *Warren Bridge*, 11 *Pet.* 420, 544, 547–8, the doctrine announced was that government, possessing powers that affect the public interests, and having entered into a contract involving such interests, is not, by means merely of implications or presumptions, to be disarmed of powers necessary to accomplish the objects of its existence; that any ambiguity in the terms of such a contract "must operate against the corporation and in favor of the public, and the corporation can claim nothing but what is clearly given by the act;" that "it can never be assumed that the Government intended to diminish its powers of accomplishing the ends of its creation;" and that those who insist that the Government has surrendered any of its powers or agreed that they may be diminished, must find clear warrant for such a contention before it can be heeded. "Grants of franchises and special privileges are always to be construed most strongly against the donee and in favor of the public." Such were the words of this court in *Turnpike* v. *Illinois*, 96 *U. S.* 63, 68. The universal rule in doubtful cases—this court said in *Oregon Railway Co.* v. *Oregonian Ry. Co.*, 130

U. S. 1, 26—is that "the construction shall be against the grantee and in favor of the Government." As late as *Coosaw Mining Co.* v. *South Carolina*, 144 *U. S.* 550, 562, this court said: "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the Government or the public has an interest.* Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication.† This principle, it has been said, is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies." *Slidell* v. *Grandjean*, 111 *U. S.* 412, 438. We have never departed from or modified these principles, but have reaffirmed them in many cases.‡

It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings.

Turning, now, to the agreement of 1882, we fail to find in it any words necessarily importing an obligation on the part of the city not to establish and maintain waterworks of its own during the term of the Water Company. It is said that the company could not possibly have believed that the city would establish waterworks to be operated in competition with its system, for such competition would be ruinous to the Water Company, as its projectors, on a moment's reflection, could have perceived when the agreement of 1882 was made. On the other hand, the city may with much reason say that, having once thought of having its own waterworks, the failure to insert in that agreement a provision precluding it, in all circumstances and during a long period, from having its own separate system,

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* Rice v. Railroad Co., 1 Black, 358, 380; Fertilizing Co. v. Hyde Park, 97 U. S. 659, 666; Hannibal &c. R. R. v. Missouri Packet Co., 125 U. S. 260, 271; Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24, 49; Stein v. Bienville Water Supply Co., 141 U. S. 67, 80; State v. Pacific Guano Co., 22 So. Car. 50, 83, 86.

† Holyoke Co. v. Lyman, 15 Wall. 500; The Binghamton Bridge, 3 Wall. 51, 75.

‡ United States v. Arredondo, 6 Pet. 691, 738; Mills v. St. Clair County, 8 How. 581; Richmond &c. R. R. Co. v. Louisa R. R. Co., 13 How. 81; Dubuque & Pacific R. R. Co. v. Litchfield, 23 How. 66, 88; Newton v. Commissioners, 100 U. S. 561.

shows that it was not its purpose to so restrict the exercise of its powers, but to remain absolutely free to act as changed circumstances or the public exigencies might demand. The stipulation in the agreement that the city would not, at any time during the thirty years commencing August 1st 1903, grant to any person or corporation the same privileges it had given to the Water Company, was by no means an agreement that it would never, during that period, construct and maintain waterworks of its own. For some reason, not distinctly disclosed by the record, the city abandoned the scheme it had at one time formed of constructing its own system of waterworks. And it may be that it did not in 1882 intend or expect ever again to think favorably of such a scheme. It may also be that the Water Company, having knowledge of what the city had done or attempted prior to 1882, deliberately concluded to risk the possibility of municipal competition, if the city would agree not to give to other persons or corporations the same privileges it had given to that company. The city did so agree, and thereby bound itself by contract to the extent just stated, omitting, as if purposely, not to bind itself further. The agreement, as executed, is entirely consistent with the idea that while the city, at the time of making the agreement of 1882, had no purpose or plan to establish and operate its own waterworks in competition with those of the Water Company, it refrained from binding itself not to do so, although willing to stipulate, as it did stipulate, that the grant to the Water Company should be exclusive as against all other persons or corporations. We are therefore constrained by the words of the agreement to hold that the city did not assume, by any contract protected by the Constitution of the United States, to restrict its right to have a system of waterworks, independent altogether of the system established and maintained by the Water Company. If this interpretation of the contract will bring hardship and loss to the Water Company, and to those having an interest in its property and bonds, the result (omitting now any consideration of the question of power) is due to the absence from the agreement between the parties of any stipulation binding the city not to do what, unless restrained, it now proposes to do.

While there is no case precisely like the present one in all its facts, the adjudged cases lead to no other conclusion than the one just indicated. We may well repeat here what was said in a somewhat similar case, where a municipal corporation established gas works of its own in competition with a private gas company which under previous authority had placed its pipes, mains, etc., in public streets to supply, and was supplying, gas for a city and its inhabitants: "It may be that the stockholders of the plaintiff supposed, at the time it became incorporated, and when they made their original investment, that the city would never do what evidently is contemplated by the ordinance of 1889. And it may be that the erection and maintenance

of gas works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's work for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of parties. As said by this court in *Curtis* v. *Whitney*, 13 *Wall.* 68, 70: 'Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by State and national legislation.' If parties wish to guard against contingencies of that kind they must do so by such clear and explicit language as will take their contracts out of the established rule that public grants, susceptible of two constructions, must receive the one most favorable to the public." *Hamilton Gaslight Co.* v. *Hamilton City*, 146 *U. S.* 258, 268; *Skaneateles Water Co.* v. *Skaneateles*, 184 *U. S.* 354, 363.

So in *Joplin* v. *Light Co.*, 191 *U. S.* 150, 156, which involved the question whether a city could establish its own electric plant in competition with that of a private corporation, the court said: "The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality while the appelle exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the powers of government."

Again, in the recent case of *Helena Waterworks Company* v. *Helena*, 195 *U. S.* 383, 392, where a city established its own system of waterworks in competition with that of a private company, the court, observing that the city had not specifically bound itself not to construct its own plant, said: "Had it been intended to exclude the city from exercising the privilege of establishing its own plant, such purpose could have been expressed by apt words, as was the case in *Walla Walla City* v. *Walla Walla Water Company*, 172 *U. S.* 1. It is doubtless true that the erection of such a plant by the city will render the property of the water company less valuable and, perhaps, unprofitable, but if it was intended to prevent such competition, a right to do so should not have been left to argument or implication, but made certain by the terms of the contract." To the same effect, as to the principle involved, are *Turnpike Co.* v. *State*, 3 *Wall.* 210, 213; *Stien* v. *Bienville Water Supply*, 141 *U. S.* 67, 81; *Long Island Water Supply Co.* v. *Brooklyn*, 166 *U. S.* 685.

It is, we think, important that the courts should adhere firmly to the salutary doctrine underlying the whole law of municipal corporations and the doctrines of the adjudged cases, that grants of special privileges

affecting the general interests are to be liberally construed in favor of the public, and that no public body, charged with public duties, be held upon mere implication or presumption to have divested itself of its powers.

As, then, the City of Knoxville cannot be held to have precluded itself by contract from establishing its own independent system of waterworks, it becomes unnecessary to consider any other question in the case. The judgment of that court dismissing the bill must be affirmed.

It is so ordered.

Mr. Justice BROWN, Mr. Justice WHITE, Mr. Justice PECKHAM, and Mr. Justice HOLMES dissented.

True copy.

Test:

Clerk Supreme Court, U. S.